

No. 10877

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RING-LING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

VOLUME II.

(Pages 385 to 756, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 7 - 1944

PAUL P. O'BRIEN,
CLERK

No. 10877

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RING-LING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

VOLUME II.

(Pages 385 to 756, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

(Testimony of P. W. Seals)

Q. Is there any evidence of any bone fragments in the spinal cavity in any of these X-rays you have just examined? A. No.

Q. Is there any discernible evidence of any displacement of the spine in any of these X-rays? A. No.

Q. When you examined the plaintiff in October, 1938, [272] Doctor, what evidence of injury did she show?

A. She showed symptoms of having had injury to the vertebrae of the back, of the lumbar and lower dorsal region of the back, which evidence was proven by the X-ray which I took and examined.

Q. Indicating the condition respecting the vertebrae which you have heretofore stated, is that right?

A. Yes.

Q. Was there any evidence of injury of the spinal area involved apparent to the eye or touch at that time?

A. No.

Q. Was she receiving any treatment at that time, Doctor? A. Yes.

Q. What was it, if you know?

A. She was wearing a rather clumsy sort of a brace, consisting of small iron bars up and down part of the spine, with straps around the body, in an attempt to support the spine.

Q. What was the proper treatment indicated for her condition at that time?

A. I thought she ought to have a stronger brace, more rigid than the support she was wearing at that time.

(Testimony of P. W. Seals)

Q. What was the condition of her leg at that time?

A. There was nothing I found wrong with the leg at that time; she was complaining of some pain in the right hip joint region. [273]

Q. Did you make any examination for numbness or anesthesia?

A. Yes, and there was none found at that time.

Q. Did you make any examination for atrophy of the muscles? A. Yes.

Q. What did you find in that regard?

A. There was none.

Q. She stated to you the type of accident she had had, did she? A. Yes.

Q. In your opinion could the injury that she received have had any effect upon her, in the leg, or either of her legs?

Mr. Marcus: I object to that upon the ground that no proper foundation has been laid. Counsel has not elicited from this witness, your Honor, what was told to him by the patient.

Q. By Mr. Combs: I will ask that. Will you relate, if you are able to do so, from either your memory or your records, what she told you generally was the nature of her accident?

A. She stated she had fallen a distance of 25 or 30 feet, and landed on her back. The injury was to her back largely. There was no evidence of fracture or injury to the leg apparent at the time of my examination. [274]

Q. In your opinion, could the injury she received in such fall have any effect upon her right leg, that is, the injury as she described it to you? A. No.

(Testimony of P. W. Seals)

Q. You examined the plaintiff again during the week of the former trial, to-wit, during the week of January 16, 1940, did you not? A. Yes.

Q. And you heard the testimony in this case of her medical expert, did you not, I believe that is Dr. Tasker—
Mr. Marcus: Dr. Steele Stewart.

Q. By Mr. Combs: Dr. Steele Stewart.

A. I am not positive about that. I heard the testimony of some other witness; I have forgotten who it was.

Q. Did you examine her with particular reference to the disability in her right leg, during the time of the 1940 trial? A. Yes.

Q. What, in your opinion, was her condition at that time?

A. At that time she had developed what she called numbness or anesthesia in different parts of the leg, which did not fit into the picture of any nerve or grouping of nerves. I mean we have a certain pattern in the body, certain nerve supplies, if you are going to have anesthesia. [275]

Q. Will you have anesthesia of the whole area, and not a part of the area?

A. The picture she made at that time could not fit into any picture.

Q. You made an examination of the areas of which she complained of anesthesia, and you state that that picture in the portion in which she complained of anesthesia did not fit into any pattern of nerve disorder?

A. That's right.

(Testimony of P. W. Seals)

Q. There isn't any question that she has had an injury to the vertebrae of the spine, is that right?

A. No.

Q. What symptoms in that spine injury, at the time of your examination in 1940, Doctor, caused her to have pain in the back?

A. Muscular spasm of the back muscle, and the pain was aggravated by motion and use of the back.

Q. Aside from this, did you determine any other symptoms or conditions in this portion? A. No.

Q. Concerning the injuries which she has, in your opinion what are her prospects for recovery from them, and to what extent will she recover?

The Court: Are you speaking of the present time?

Mr. Combs: I will withdraw that.

Q. As of the date of your examination in 1940, Doctor, [276] what was your opinion then as to the possibilities of her recovery from the injuries you saw indicated there?

A. I felt, with proper treatment, she would be able to perform some remunerative occupation, but not that of a trapeze performer.

Q. She would not be able to perform on a trapeze?

A. No, but she would be able to do any remunerative light occupation, many of which are available at the present time.

Mr. Combs: That is all.

(Testimony of P. W. Seals)

Cross Examination

Q. By Mr. Marcus: Dr. Seals, what kind of work are you doing now?

A. Largely industrial.

Q. Are you doing orthopedic work?

A. I am doing orthopedic work, if it is overlapping the industrial.

Q. Then you are doing some orthopedic work?

A. Yes.

Q. By whom are you employed at the present time?

A. Myself.

Q. Who do you do work for?

A. I do work for several of the industrial plants.

Q. You stated that in 1938 you were employed by the State Compensation Insurance Fund?

A. Not at that time. My employment with them was in [277] 1920 to 1922.

Q. At the time of your examination had you been employed by the State Compensation Insurance Fund, or by any insurance company?

A. Except the cases they referred to me. I was not under any contract or salary with any of them, but they referred me to numerous cases to treat.

Q. What has been your experience in reading X-rays, Doctor?

A. I have had my own X-ray machine since 1923, and my own X-ray technician. During that time I have read several thousand X-rays, not only my own, but what I have seen in the various hospitals.

Q. You have read several thousand?

A. Yes.

(Testimony of P. W. Seals)

Q. Now, Doctor, point out to the jury the three vertebrae that have been injured.

A. That is the twelfth dorsal, which shows a very slight compression in the front part of the body of the vertebra.

Q. How far down does that compression come?

A. About one-sixth of the thickness of the vertebra.

Q. That indicates a very slight injury, one-sixth of the vertebra compressed?

A. Very slight, so far as permanent disability. It would give considerable pain. [278]

Q. Look at No. 1.

A. It is the first lumbar vertebra, which shows a slight fracture line extending through the anterior part of it.

Q. That extends approximately halfway down, doesn't it?

A. The fracture line does, but not the compression. The fracture line extends from here to down about the middle of the vertebra, but that is not compressed that much.

Q. No. 1?

A. No. 1 is just slightly compressed, about the same amount as the twelfth dorsal. That is the second lumbar.

Q. Is there anything else unusual about this X-ray, Doctor?

A. Not that I have been able to observe. I examined that very carefully once before.

Q. Look at it carefully, Doctor, and tell me whether or not there is any part of the spine or vertebrae missing?

A. I don't see any.

(Testimony of P. W. Seals)

Q. Look for the disks, Doctor.

A. There is space between all the vertebrae.

Q. Are the disks misplaced, Doctor?

A. I don't see any disks in the X-ray.

Q. You can't? A. No.

Q. Is that part of the vertebrae? A. No, that is a padding in between the vertebrae. [279]

Q. That is a padding in between the vertebrae?

A. Yes.

Q. That isn't part of the vertebrae? A. No.

Q. It is part of the spine?

A. Part of the spine.

Q. Show it to me then.

A. Any of these spaces; as you come down, the space between the vertebrae varies a great deal. The angle at which X-rays are taken will show the space between the vertebrae a great deal differently. You have got what we call a pin point or special view and in order to determine how much space there is between the vertebrae.

Q. Did you take any X-rays to determine whether or not there were any disks missing? A. No.

Q. You did not? A. No.

Q. But you can determine it from an X-ray, though, can you not, Doctor?

A. Sometimes you can.

Q. You said, Doctor, that her complaints about anesthesia did not fit any patterns that would indicate there was a nerve injury, is that correct?

A. That's right.

(Testimony of P. W. Seals)

Q. Doctor, where do the nerves from the spine emanate [280] that go to the leg?

A. They emanate in the lower part of the spine.

Q. Show us on the X-ray.

A. It emanates in here.

Q. The entire lower limbs?

A. They begin about here, to about here.

Q. That would involve the same vertebra that is injured, would it not?

A. It would involve the same area, yes, but—

Q. That's right.

The Court: Let him finish the answer.

A. But the injury to the vertebrae themselves has nothing to do with the nerves, unless it causes compression or some damage to the nerves.

Q. By Mr. Marcus: Didn't you state that these were compression fractures? A. Yes.

Q. Would it be possible, Doctor, that the compression would involve the spinal cord?

A. The nerves in the spinal cord.

Q. Can you answer yes or no? Then give your explanation.

A. No; the explanation is this: The nerves of the spinal column come out toward the back, not toward the front. This space you see is the spinal column. The nerves come out through the back, and as shown by other X-rays there is no [281] damage to that part of the vertebrae. If you will permit me to put that up there, I can explain it.

(Testimony of P. W. Seals)

Q. Surely, Doctor. Does a true amnesia, Doctor, indicate to you that there has been an involvement of the nerve? A. A true amnesia?

The Court: You mean, anesthesia?

A. If you have anesthesia, yes. May I finish the explanation?

The Court: Certainly.

A. You can see the back part of your vertebrae is not disturbed at all.

The Court: Is that the posterior view?

A. The anterior-posterior view, yes. If you took this view only it would not show that there had been any injury to the vertebrae at all.

Q. By Mr. Marcus: A compression fracture of the spinal column could affect the spinal column too, could it not?

A. It probably would, but not a compression fracture of the body alone.

The Court: You say "body"; do you mean the body of the vertebrae?

A. Yes, the body of the vertebrae alone.

The Court: Not the body of the patient?

A. No.

Q. By Mr. Marcus: Doctor, how can you tell whether there [282] has been an injury to the spinal column?

A. You can tell by symptoms. These develop immediately; not several months later. This is the only view that will show that. The other view will not show; this view will not show the compression fracture of the body of the vertebrae.

(Testimony of P. W. Seals)

Q. The back part of the spine is one straight bone, is it not? A. No.

Q. Or one bone, I should say?

A. No, each vertebrae has its own set of transverse process and spinous process. In each vertebra you have this transverse process there. The spine itself is what you feel in back. That sticks out behind.

Q. They all join each other, do they not?

A. Yes.

Q. In back? A. Yes.

Q. But in front of the spinal column, we will call it, these are separate, and are called vertebrae, are they not?

A. The whole structure is called a vertebra.

Q. I am talking about the front part.

A. The front part is called the body of the vertebra, separated by these disks.

Q. If there is compression of the front of the vertebra, as indicated in these pictures, then you have a destruction or compression of the vertebrae and disks between them, do [283] you not?

A. You may or may not have.

Q. You can see the disks in the X-rays, as you have testified?

A. No, I see the space the disks occupy.

Q. Look at this X-ray, and tell me whether or not these dense areas above the injured portion of the spine do not indicate to you the disks?

A. They indicate where the disks are.

(Testimony of P. W. Seals)

Q. Look at the bottom part, and tell me whether or not that same condition exists with reference to the injured portion of all the vertebrae?

A. Yes, it indicates the same thing.

Q. When you say the disks, is that this space you can see up here?

A. Yes.

Q. You can see it down here?

A. Surely, you can. The dark space in between the vertebrae, the dark line between the vertebrae, and all these vertebrae is the disk.

Q. In other words, you say this density up here, which you state is the disk, is the same as the density between the injured vertebrae?

A. Yes.

Mr. Marcus: I will let the jury look at it, if the court please. [284]

A. May I give a further explanation. The disk in the lumbar area is thicker and wider than in the upper or dorsal area. This space between the vertebrae here is larger.

Q. The disks would be larger?

A. They should be.

Q. This is one density, is it?

A. Yes; that is due, in that picture, to the overlapping of the bottom. As you go down to the upper part, it angles in this way; it goes straight up as you go down to the lumbar area.

Q. What happens when the disk is destroyed, Doctor?

A. There might not anything happen.

Q. Is it possible, when a disk has been compressed, that it can go into the spinal canal?

A. Yes, it goes into the spinal canal, and presses on the spinal cord.

Q. It presses on the spinal canal?

(Testimony of P. W. Seals)

The Court: You are misquoting the Doctor. He said it goes into the spinal canal, and presses on the spinal cord. Is that what you said? A. Yes.

Q. By Mr. Marcus: What happens when it presses on the spinal cord?

A. It produces an anesthesia.

Q. If it involves the area indicated by the injury, what part of her body would it affect? [285]

A. Her lower extremities.

Q. Did she tell you at the time, Doctor, that she suffered a fracture of her arm?

A. In this accident?

Q. Yes.

A. No, she told me she suffered a fracture of both arms in a previous accident.

Mr. Marcus: That is all.

Redirect Examination

Q. By Mr. Combs: There is no evidence in this examination you made of any of the disks, any portion of the disks, or any bone structure, having been forced into the spinal cavity, is that right? A. That's right.

Mr. Combs: That is all.

Q. By Mr. Marcus: Doctor, if it was forced into the spinal cavity, would you be able to tell from the X-ray? A. No.

Q. How do you tell us now it was not forced into the spinal cavity?

Mr. Combs: That is assuming something not in evidence. My question was there is no evidence.

Q. By Mr. Marcus: Can you definitely tell us now that it did not penetrate the spinal cavity? A. No.

Mr. Marcus: That is all. [286]

Mr. Combs: At this time, if your Honor please, I would like to read from the transcript of the former trial, and have Mr. Corkery read the answers, if that is all right.

The Court: That is satisfactory.

Mr. Combs: That will be page 339, counsel, the witness Pat Valdo. Testimony of

PAT VALDO,

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Corkery.)

"Q—Is that your true name, Pat Valdo?

"A—Yes, sir.

"Q—By Mr. Combs: Where do you reside, Mr. Valdo?

"A—Sarasota, Florida.

"Q—What is your occupation?

"A—I am talent scout for the Ringling Bros. Circus.

"Q—Are you employed by them at the present time?

"A—Yes, sir.

"Q—How long have you been employed in that capacity by them?

"A—About twelve years.

"Q—When did you first meet America Olvera?

"A—In the fall of 1933.

"Q—Where?

"A—In Jacksonville, Florida.

(Deposition of Pat Valdo)

"Q—Under what circumstances? [287]

"A—She came into the show about a week before we closed that season. She came on with her brother.

"Q—That was about what time of the year, did you say?

"A—That would be in the fall; in October, I believe.

"Q—About October of that year. Did you employ her or engage her as an act for the Ringling Bros. Circus at that time?

"A—No, sir.

"Q—Do you know who did?

"A—Mr. Gumpertz engaged her, her first engagement.

"Q—In the fall of 1936 did you have any conversation with Miss Olvera respecting her employment by Ringling Bros. for the production of her act?

"A—Yes, sir.

"Q—When did that conversation take place?

"A—Well, I don't recall. Her contract is dated the 24th, I believe, of September.

"Q—Of September, 1936, is that it?

"A—Yes.

"Q—Do you recall the time of the signing of that contract?

"A—I don't recall exactly. I wired the other day to find out what city we were in. We were in Wichita Falls, Texas.

"Q—Wichita Falls, Texas?

"A—Whether the contract was signed there or not I [288] couldn't say.

(Deposition of Pat Valdo)

“Q—Do you know of your own knowledge whether or not Ringling Bros. ever paid America Olvera her salary during the year 1937?

“A—No, sir.

“Q—That is, do you know whether or not they paid it or do you know that they did not pay it?

“A—They did not pay it.

“Q—You know that they did not pay it?

“A—That is, the season of 1937.

“Q—That is for the season of 1937?

“A—Yes, sir.

“Q—At that time was she performing with the Ringling Circus?

“A—No, sir.

“Q—Do you know what circus she was performing with?

“A—Al G. Barnes.

“Q—On the day of September 12, 1937, where were you?

“A—I went to Anthony, Kansas to see the Al G. Barnes Circus.

“Q—And did you observe or did you see America Olvera Pollinger on that day?

“A—Yes, sir.

“Q—Where did you see her?

“A—I saw her in the main tent before the performance for a minute. Just said hello to her. I didn't see her [289] again until after her accident.

(Deposition of Pat Valdo)

"Q—Then what did you do after you had spoken to her there in the main tent?

"A—Well, I talked with a great many of the artists and Mr. Cronin.

"Q—I mean, when was the next time you saw America Olvera Pollinger that day?

"A—To speak to?

"Q—No, at all?

"A—I saw her do her act.

"Q—Where were you when you saw her do her act?

"A—Sitting directly in front of her.

"Q—Whereabouts, in the grandstand?

"A—In the grandstand.

"Q—Was anyone with you?

"A—Mr. Cronin was there. Mrs. Bradner from the Ringling Bros. and Mr. Gray from the Ringling Bros. Circus.

"Q—You were all seated together in the stand?

"A—Yes, sir—excuse me one minute.

"Q—Yes.

"A—Mr. Cronin had gone out after the show started, and then came back in during Miss Olvera's act.

"Q—So that he was there, sitting with you, at the time of Miss Olvera's act, is that correct?

"A—Yes, sir.

"Q—Did you observe anything extraordinary take place [290] on that day; anything out of the usual?

"A—In what respect?

"Q—Well, did you observe an accident that day?

"A—Yes, sir.

(Deposition of Pat Valdo)

“Q—Will you relate to the jury exactly what you saw and what you did insofar as that accident is concerned?

“A—Well, Miss America came in, was pulled to her trapeze as usual, went through her act as usual until the time came for her to do her kneeling trick on her knees. She got on her knees; she was swung by her husband possibly three or four times, and at the extreme front of the swing she fell from the trapeze and missed the net, falling over the net, in front of the net.

“Q—Did you observe the net on that day just prior to her commencing her act, underneath her trapeze?

“A—You mean before the boys had picked it up?

“Q—I will withdraw the question. When did you first observe the net on that day?

“A—Well, I observed it for the reason that the Ringling show did not use a net of that type. This was not a net.

“Q—Will you describe that net to the jury as best you can?

“A—The net was made out of canvas with rope hand-holds set on the side so the boys could hold it. It was similar to the net used by the Wallingers in the Ringling show, [291] used not to catch a performer that would fall, but to add to the effect of the trick.

“Q—Can you describe the approximate dimensions of that net?

“A—I would say it was 8 or 10 feet square.

“Q—And by how many men was it held, approximately?

“A—That I don't recall approximately. Possibly eight or ten.

(Deposition of Pat Valdo)

"Q—Now, at the time Miss Olvera commenced her act, and during the performance of the act, will you relate where with relation to her trapeze this net was?

"A—Directly under it, so far as I recollect.

"Q—Directly under it so far as you could observe?

"A—Yes.

"Q—Did you observe America Olvera Pollinger performing with the Ringling Bros. show in the first part of 1937?

"A—Yes.

"Q—Did she use a net when performing for the Ringling show?

"A—The first season she didn't use a net. The second season, she had a fall in Madison Square Gardens, and after she recovered and rejoined the show, she used a net for one trick.

"Q—Which part of the act?

"A—I don't recall. It was not the finishing trick. It was one of the standing tricks. [292]

"Q—Was a net used for any part of her show while she was with the Ringling show?

"A—No.

"Q—Now back to the time of the accident, what did you observe with relation to the trapeze itself immediately after she fell therefrom?

"A—I didn't observe anything unusual. The trapeze was swinging.

"Q—Was it level or was one side lower than the other?

"A—To my best knowledge and belief, it was level. It would be very difficult to say that with the trapeze swinging.

(Deposition of Pat Valdo)

“Q—But you believe it was level, is that correct?

“A—Yes.

“Q—Now, when Miss Olvera fell, what did you do?

“A—I had to remain in the seat. Her husband picked her up and carried her out, and I sent a boy out to find out how badly she was injured or just what had happened. The boy came back to me and said they were going to take her to the hospital. I had to stay there because I had to check up on the show that day.

“Q—For what reason were you checking that show?

“A—Possible material for Ringling Brothers.

“Q—Do you scout other shows other than the Barnes' show through the years?

“A—Yes, sir.

“Q—In fact, that is your field of operation, is [293] scouting and obtaining talent, is it not?

“A—Yes, sir.

“Q—What did you observe occurring about or near Miss Olvera immediately after the fall?

“A—Her husband picked her up and rushed her out of the ring.

“Q—How quickly after she had fallen?

“A—Immediately; as soon as he could get there.

“Q—How many seconds, if any, elapsed before he picked her up and carried her out in that manner?

“A—Well, that would be very difficult, to name the exact number of seconds. As fast as he could get from where he was standing over to pick her up. Possibly 8 or 10 feet, I would say, he was away from her.

(Deposition of Pat Valdo)

"Q—In any event, she was carried out promptly?

"A—Yes, sir.

"Q—When next after that did you see Miss Olvera?

"A—At the hospital.

"Q—Where? In Anthony, Kansas?

"A—In Anthony, Kansas.

"Q—At what time?

"A—It was after the matinee performance.

"Q—Who was present?

"A—I think Miss Bradner and Mr. Graves. I am not sure. I am sure Miss Bradner was *there*."

(The Court, after admonishing the jury took an adjournment until 2:00 o'clock p. m. of the same day.)
[294]

Afternoon Session

2:00 o'clock.

(Stipulated that the jurors were present and in their box.)

(Reading of the testimony of *Pete Valdo* resumed.)

"Q—Was Mr. Pollinger there?

"A—He came in later, I believe.

"Q—On what day was that? Was that the same day of the accident?

"A—Yes, sir.

"Q—Was anything said at that time by you and was anything said by Miss Olvera?

"A—Do you want me to relate the conversation?

(Deposition of Pat Valdo)

“Q—First say whether anything was said or not.

“A—Well, I expressed my sympathy for her as well as I could on such an occasion.

“Q—Just say ‘Yes’ or ‘No.’ There was something said?

“A—Oh, yes.

“Q—Now relate the conversation to the best of your recollection.

“A—Well, I expressed my sympathy. America looked very forlorn. She told me her elbow was dislocated, and I told her not to worry.

“Q—Did she say anything else?

“A—Not that I recall. Just a usual conversation. [295]

“Q—Did she say anything else that you recall particularly?

“A—Not that I remember, no, sir.

“Q—I will ask you whether or not Miss Olvera said this to you, and you answered as I will read? I am now reading from page 89, lines 23 to 25, of the transcript in this case: ‘Mr. Valdo, wasn’t that awful, that hook trapped me out?’ To which you are supposed to have answered, ‘Yes, America. It was awful.’

“Did you say that and did she say that at that time?

“A—No, sir.

“Q—Or anything like that?

“A—No, sir.

“Q—Did you hear any noise or snap at the time of this accident?

“A—No, sir.

“Q—Are there any other details that you can think of at the moment that have escaped you that you would like

(Deposition of Pat Valdo)

to relate to the jury respecting this particular accident and the accident itself?

"A—The only thing I can say is that the apparatus looked absolutely normal. Nothing noticeable to me.

"Q—Nothing noticeable about it at all?

"A—Not to me.

"Q—That is all. [296]

"Q—By Mr. Marcus: Did you say that you did not engage Miss America in 1936?

"A—Yes, sir.

"Q—Is it not a fact that you told Miss America that when you returned from Europe you would engage her services at that time?

"A—No, sir. May I explain this situation? Miss America came to the circus and Mr. Gumpertz wanted to see her act. I left immediately after the circus closed for Europe. While I was in Europe Mr. Gumpertz had seen Miss Olvera's act and wrote me and said 'For your information, I have engaged America Olvera.' When I returned from Europe he told me he had engaged her and at what salary. I issued the contract, gave it to Miss Olvera, Miss Olvera signed it, Mr. Gumpertz signed it, and she was given her copy and we kept our copy.

"Q—Well, the contract was not signed until you returned, is not that a fact?

"A—That is a fact, yes.

"Q—And is it not a fact that before Mr. Gumpertz had authority to employ anyone, you had to approve of the employment?

"A—No, sir. Mr. Gumpertz was the general manager. I took my orders from him.

(Deposition of Pat Valdo)

“Q—Is it not a fact that you saw Miss America’s act before you went to Europe? [297]

“A—No, sir.

“Q—Did you see her act after you returned from Europe?

“A—Yes, sir.

“Q—That was before the contract was signed?

“A—That I don’t recall.

“Q—Is it not a fact that after you saw her act the contract was executed?

“A—I cannot recall that.

“Q—This contract was with Ringling Brothers, wasn’t it?

“A—Yes. May I explain something now?”

Mr. Combs: Then skip to line 6:

“A—Mr. Gumpertz engaged Miss America. The engagement was possibly oral. The signing of the contract was a mere matter of form after I returned.

“Q—But the contract was not signed until you did return?

“A—No, sir.

“Q—At that time was her brother with the circus?

“A—Yes.

“Q—You said something about her having an accident in Madison Square Gardens. Were you there when it happened?

“A—Yes, sir.

“Q—Do you know how the accident happened?

“A—I didn’t see the accident. I heard of it.

(Deposition of Pat Valdo)

"Q—That is what I asked you.

"A—You asked if I was in Madison Square Gardens. I was in the Gardens. [298]

"Q—You did not see the accident?

"A—No, sir.

"Q—You don't know how it happened?

"A—Only from hearsay.

"Q—Or in what manner it happened?

"A—Only from hearsay.

"Q—You say you are a talent scout?

"A—Talent scout, and I arrange the programs and direct the performances during the summer.

"Q—You tell the people where to go?

"A—I send out their acts.

"Q—You send them to wherever you want to?

"A—I employ them only for the Ringling Circus.

"Q—You employ them only for the Ringling Circus, but you send them out to wherever you want them to go?

"A—No, sir.

"Q—Didn't you send Miss America to the Barnes show?

"A—Yes.

"Q—Did you send the Christianas to the Barnes show?

"A—Yes.

"Q—Didn't you send Bert Nelson to the Hagenback-Wallace show?

"A—Yes.

"Q—Didn't you send Hal Silver to the Barnes show?

"A—Yes.

(Deposition of Pat Valdo)

“Q—Those were all under contract with Ringling Brothers, [299] were they not?

“A—No. Excuse me—

“Q—Well, weren’t they?

“A—No, sir.

“Q—Didn’t you employ people for the Barnes show, too?

“A—Sometimes.

“Q—Well, I mean the shows I mentioned, the Barnes show, the Hagenback-Wallace, and the Ringling show.

“A—Yes.

“Q—And those were under contracts they signed with Ringling, were they not?

“A—Not always, no.

“Q—In what instances I have mentioned did you or did you not send these acts to the other shows on Ringling Brothers contracts?

“A—Well, Nelson didn’t have a Ringling contract. He had a Hagenback-Wallace contract.

“Q—You are not sure of that, are you?

“A—I could not swear to it, no.

“Q—Now, at the time you went to the Barnes show at Anthony, Kansas, you had requested him to go there, hadn’t you?

“A—No, sir.

“Q—Didn’t you have a conversation with Bert Nelson and you told him that you would go over to the Barnes show and meet him at Anthony, Kansas? [300]

“A—We went over there together to the Barnes show.

(Deposition of Pat Valdo)

"Q—You say you went to look over the acts?

"A—Yes, sir.

"Q—You had nothing to do or no connection with the Barnes show at all?

"A—Mr. Cronin was the manager. My only connection was sending acts there occasionally.

"Q—Do you have anything to do with the show itself?

"A—No.

"Q—You didn't arrange any programs for them?

"A—Arrange their programs?

"Q—Yes.

"A—If the programs would work that way.

"Q—If it worked you sent it?

"A—Yes.

"Q—And you did send some, didn't you?

"A—Programs?

"Q—In the 1926 and 1937 season?

"A—Yes, sir.

"Q—You say you went to the Barnes show to find out if there were any acts on there that you could use in your circus?

"A—Yes, sir.

"Q—Isn't it a fact that all the acts you had sent to the Barnes show?

"A—No. [301]

"Q—Was Hal Silver performing there?

"A—Yes, sir.

(Deposition of Pat Valdo)

“Q—Didn’t you engage Hal Silver?

“A—No, sir.

“Q—You did not?

“A—No, sir.

“Q—Do you know who engaged him?

“A—Mr. Cronin.

“Q—Do you know who engaged Bert Nelson?

“A—Yes, sir.

“Q—Was he performing?

“A—Was he performing where?

“Q—That year, for the Barnes show?

“A—He was engaged before that, with the Hagenback show.

“Q—Did you engage him?

“A—Mr. Gumpertz engaged him.

“Q—You say you did not?

“A—Positively not.

“Q—He was engaged by the Ringling show, wasn’t he?

“A—No, he was engaged by Mr. Gumpertz for the Hagenback-Wallace Circus.

“Q—He was engaged by the Ringling show under a Ringling contract, wasn’t he?

“A—No.

“Q—Are you sure of that?

“A—I won’t be sure of the contract. I am sure of the [302] circus.

“Q—He went to the Hagenback show, you say?

“A—Yes, sir.

(Deposition of Pat Valdo)

"Q—You don't know whether he had a Ringling Bros. contract or not?

"A—Yes, sir—may I explain something?

"Q—Go ahead.

"A—We were in Los Angeles with the Ringling Bros. circus when I heard about Bert Nelson, and Mr. Gumpertz and I went—I can't recall the address. He would know it—to see him work one animal. Mr. Gumpertz saw him work the animal and then engaged him.

"Q—With a Ringling Bros. contract?

"A—That I don't recall. I don't think he was contracted at that time.

"Q—You say he had a Hagenback-Wallace contract?

"A—When the Hagenback-Wallace show was in existence.

"Q—It isn't in existence now?

"A—No.

"Q—And you did engage people for the Hagenback show?

"A—Yes.

"Q—And did you engage people for the Barnes show, too?

"A—Not all of them.

"Q—I didn't ask you all of them. Did you engage people for the Barnes show?

"A—Yes. [303]

"Q—Who did you engage?

"A—What year?

"Q—1936 and 1937.

"A—I will have to think a little bit now.

(Deposition of Pat Valdo)

“Q—All right.

“A—Miss Olvera was engaged in 1937 by me, and the Christiana family.

“Q—You engaged them for the Barnes show?

“A—The Christiana family were first engaged by the Hagenback Circus.

“Q—I am talking about the Barnes show.

“A—That year?

“Q—Yes.

“A—Yes.

“Q—But you gave her a Ringling Bros. contract, didn't you?

“A—Yes, sir.

“Q—And the same is true with the Christianas?

“A—I believe that the Christianas had a Barnes show contract.

“Q—And you engaged them, didn't you?

“A—Yes, sir.

“Q—Then you were a managing director of the Barnes show, too, weren't you?

“A—No, sir.

“Q—What else did you do besides arrange programs and supply people? [304]

“A—I occasionally sent people out there for the show.

“Q—When did you send Bert out there?

“A—I would have to look that up.

“Q—He was there in 1936 and 1937?

“A—I don't know whether he was there in 1936 and 1937.

(Deposition of Pat Valdo)

"Q—He was if he was there during the time Miss America was there?

"A—Yes, that is right.

"Q—That was the 1936 or 1937 season, isn't that true?

"A—That was either the 1936 or 1937 season.

"Q—At the time Miss America was injured you knew he was there, didn't you?

"A—Yes.

"Q—And if he was there, and you know he was there, you engaged him to go there, didn't you?

"A—Mr. Gumpertz engaged him.

"Q—Did you send him there?

"A—Did I send him there?

"Q—Yes.

"A—Under Mr. Gumpertz's instructions.

"Q—And the Christianas?

"A—The same holds true with the Christianas.

"Q—You saw them perform on the day of the accident?

"A—Yes, sir.

"Q—You sent them there, did you?

"A—To the Barnes Circus? [305]

"Q—Yes.

"A—Yes.

"Q—And you engaged them?

"A—Yes, sir.

"Q—And Miss America the same, is that right?

"A—Yes.

(Deposition of Pat Valdo)

“Q—And how about Hal Silver?

“A—Silver was first engaged with the Barnes show by Mr. Cronin.

“Q—Was he ever with the Ringling Bros. show?

“A—After. That is why I saw the show. After I saw Mr. Silver work with the Barnes show I took him with the Ringling show.

“Q—That is one out of the three?

“A—Well, we had the Christianas with the Ringling show before that.

“Q—That is what I say. You had Miss America?

“A—Yes.

“Q—And you had Bert Nelson?

“A—With the Hagenback show.

“The Court: While he was under contract did you take him with the Ringling show?

“A—Who is that?

“The Court: Silver.

“A—No. That was under another contract. There was a year intervening before we took him. [306]

“Q—By Mr. Marcus: You say you were sitting in the grandstand?

“A—Yes, sir.

“Q—You had seen her perform her act many times before, hadn't you?

“A—Yes, sir.

“Q—You were acquainted with her act?

“A—Yes, sir.

(Deposition of Pat Valdo)

"Q—You knew that her husband pulled her out on the swing to get her started?

"A—That day, yes, sir.

"Q—Before that?

"A—Before that; no, she wasn't married when she was with the Ringling Circus.

"Q—Do you know that anybody pulled her out?

"A—You mean swing her?

"Q—Swing her; start her?

"A—Yes.

"Q—Then they stepped out of the ring?

"A—Yes, sir—no, they stepped out of the way of the trapeze.

"Q—Then did she continue to swing to get momentum?

"A—Yes, she worked up the swing herself.

"Q—That is right. Then she would step on the bar, wouldn't she, to stand up?

"A—She is always on the bar. [307]

"Q—To stand up on the bar?

"A—Yes, sir.

"Q—And at that time she was sitting down. When the swing would start she would be sitting down?

"A—Yes, sir.

"Q—Then after the party would leave the rope, who assisted her in swinging, she would swing out herself to get momentum, is that correct?

"A—Yes.

"Q—And she would stand up on the bar. Do you remember that?

"A—Yes.

(Deposition of Pat Valdo)

“Q—Then she would look up and put her arms out, as she indicated here?

“A—I don’t remember the looking up.

“Q—You don’t remember her looking up at all?

“A—No.

“Q—At any other time previous do you remember her looking up?

“A—I wouldn’t notice a motion like that. I don’t think that would be noticed.

“Q—You don’t remember seeing her?

“A—No.

“Q—At any other time?

“A—No.

“Q—Did she stand up on the trapeze the day of the acci- [308] dent happened?

“A—Well, she usually did. She did her regular routine; as far as I recall she did.

“Q—And as she stood up, she fell, is that right?

“A—No, sir.

“Q—When did she fall?

“A—She fell as she was on her knees, swinging.

“Q—Do you remember how it happened?

“A—Yes, sir.

“Q—Exactly?

“A—Nobody knows how that accident happened, exactly.

“Q—Do you remember it?

“A—I remember. To the best of my knowledge she was on her knees swinging, just before she did her handkerchief trick.

(Deposition of Pat Valdo)

"Q—She hadn't stood up at all?

"A—She stood up previous to that. She stood up and then came down with her knees.

"Q—Was she standing up when she fell?

"A—On her knees.

"Q—She wasn't standing up then?

"A—She was on her knees.

"Q—That was the trick she described here in court, then, when she fell?

"A—I don't remember that.

"Q—You don't remember what trick she was doing when [309] she fell?

"A—On her knees. Swinging on her knees.

"Q—Isn't it a fact that she was swinging out, getting momentum, when the trapeze reached its ultimate swing and she began to stand up in that trick?

"A—I couldn't say. I don't recall.

"Q—You don't remember that?

"A—No, sir.

"Q—You were observing her that time while you were in the grandstand?

"A—I was looking at her. There were two other acts on the same time.

"Q—You were looking at the other acts, too?

"A—Occasionally.

"Q—You knew her act?

"A—Yes, sir.

"Q—Did you know the other two acts?

"A—Yes.

(Deposition of Pat Valdo)

“Q—You had seen them?

“A—They were little acts.

“Q—Who were they?

“A—One was Bertha Matlock, I think. I don’t recall who that was.

“Q—Do you remember that act?

“A—No.

“Q—Was that ever with the Ringling Bros. show? [310]

“A—No.

“Q—How about the third act that was there?

“A—I do not recall who that was.

“Q—Do you remember the performance that was given?

“A—Yes, they were trapeze acts.

“Q—Did you see them perform?

“A—I saw two acts in there, yes, sir.

“Q—And you came there to see acts that you had never seen before, is that right?

“A—Yes, sir.

“Q—Had you seen these acts before?

“A—Yes.

“Q—Where?

“A—At the Barnes show. They had been there for years.

“Q—You had been to the Barnes show before?

“A—Oh, yes. Not that season, but every year since—

“Q—You were watching the other acts?

“The Court: Since what?

(Deposition of Pat Valdo)

"A—Since the Barnes show was sold from Al G. Barnes. Then I had seen it when Al G. Barnes was the manager. I had been there and seen it.

"Q—How far were you sitting from the center ring?

"A—Well, I would say the hippodrome track is approximately twenty feet wide, the ring would be about thirty-six feet wide. She was possibly forty-three or forty-five feet.

"Q—Up to the grandstand? [311]

"A—From where I was sitting to the ground under her trapeze.

"Q—You were sitting in the grandstand?

"A—Yes, sir.

"Q—The same as the other spectators were in the grandstand?

"A—Yes, sir.

"Q—Where was the band located?

"A—Opposite; on the opposite side of the tent.

"Q—Was the band playing?

"A—Yes, sir.

"Q—Do you know whether you heard any snap of the trapeze at the time she fell?

"A—No, sir.

"Q—Your answer is you don't remember?

"A—I didn't hear any.

"Q—You didn't hear any?

"A—No, sir.

"Q—And afterwards you looked at the trapeze, did you?

"A—Yes—I won't say I did. I can't recall that.

(Deposition of Pat Valdo)

“Q—You don’t remember whether you looked at it or not?

“A—No.

“Q—So you wouldn’t know whether one side was lower or the other side was lower, would you?

“A—No, sir.

“Q—You didn’t go down to see her when she was lying [312] there, did you?

“A—On the ground?

“Q—Yes.

“A—No, sir. They took her immediately to the doctor’s tent.

“Q—When she was in the doctor’s tent you didn’t go to see her?

“A—No.

“Q—You had known her about four or five years before?

“A—Yes.

“Q—She had been with your circus for some time?

“A—Yes. May I explain that answer about not going to the doctor’s tent?

“Q—All right.

“A—Usually the doctor objects to people going in there right after an accident. The tents are very small, and that was—

“Q—Well, how long after she entered the hospital did you go to see her?

“A—The minute the matinee was over.

“Q—Did you hear her holler while she was lying there?

“A—No.

(Deposition of Pat Valdo)

"Q—You didn't hear her say anything?

"A—No.

"Q—Did you see her lying there, from the grandstand?

"A—This all happened so quickly. She couldn't have [313] laid there over three or four seconds; as fast as her husband could get to her and get her out.

"Q—Do you remember the Indian chief going out with her?

"A—No, sir.

"Q—You say her husband took her?

"A—Yes.

"Q—And you went to the hospital to see her?

"A—Yes, immediately after the matinee was over.

"Q—What was her condition at that time?

"A—She was in bed, and she told me—

"Q—What was her condition? Was she conscious or unconscious?

"A—She was conscious.

"Q—She talked to you?

"A—Yes.

"Q—Did she say, 'The trapeze threw me out'?

"A—I don't recall it.

"Q—Is your testimony now that you don't recall it?

"A—She did not say it.

"Q—Do you recall anything else she said at that time, besides what you have related here?

"A—I don't know. That is three years ago.

"Q—You did talk to her, though?

"A—Yes.

(Deposition of Pat Valdo)

“Q—You did have a further conversation, other than what you have related here? [314]

“A—I expressed my sympathy. I was very sorry for her. I told her not to worry.

“Q—There was further conversation, wasn't there?

“A—I don't think so. I wasn't in the hospital very long.

“Q—Did you see her after that?

“A—Yes, sir.

“Q—Where?

“A—Houston, Texas.

“Q—She came to talk to you, didn't she?

“A—Yes, sir.

“Q—You haven't engaged her since that time, have you?

“A—We offered her an engagement after that.

“Q—She asked for a job, didn't she?

“A—Yes, sir.

“Q—And you offered her a position?

“A—Yes, sir.

“Q—You know she tried, don't you, to perform her act? Was she employed by you?

“A—After that? After the accident?

“Q—Yes.

“A—No, sir.

“Q—Do you know why?

“A—She said she wasn't able to work.

(Deposition of Pat Valdo)

“Redirect Examination

“Q—By Mr. Combs: Referring to this experience when you saw her at Houston, will you state how she appeared to [315] you at that time? In other words, did she come to you being carried by someone or did she come walking herself?

“A—She walked.

“Q—And she came and saw you in person there?

“A—Yes, sir.

“Q—Walking?

“A—Yes, sir.

“Q—Was anyone with her?

“A—No, sir.

“Q—On the day of the accident, or about the time thereof, did you observe Mr. Pollinger in the ring or near the ring?

“A—Yes, sir.

“Q—Did you observe whether or not he inspected the rigging on that day, the rigging of the act?

“A—I did not.

“Q—How did it happen that you observed him?

“A—In the ring?

“Q—Yes.

“A—The way he was dressed.

“Q—How was he dressed?

“A—He had on a bathrobe.

“Q—Referring to the acts in the Barnes Circus, there were a great many other acts; by that I mean 20 or 30 other acts, or maybe more than that, other than those three or four acts referred to by counsel, were there not? [316]

“A—Yes, sir.

(Testimony of Robert Thornton)

“Q—Can you fix approximately the number of acts there were on the Barnes show on the 12th of September, 1937, to the best of your recollection?

“A—There were possibly a hundred performers.

“Q—A hundred performers?

“A—Yes, sir.

“Q—And of those hundred performers, do you have any idea how many you engaged for the Barnes show?

“A—Miss Olvera, the Christianas, and Bert Nelson.

“Q—And those three were all; and Bert Nelson was engaged in the manner you have related, with Mr. Gumpertz?

“A—Yes, sir.

“Q—Out of a hundred, those were the only ones you had anything to do with?

“A—The only three who were not engaged by Mr. Cronin.

“Cross-examination

“Q—Mr. Valdo, did America Olvera ever state to you at any time that her accident was caused by any failure of apparatus?

“A—No, sir.

“Q—Do you mean to state, Mr. Valdo, that Miss America never at any time stated to you that it was the fault of her apparatus that threw her out?

“A—No, sir.

“Q—She did tell you, didn't she? [317]

“A—No, sir.

(Deposition of Pat Valdo)

“Q—Did you understand my question?

“A—I understood you to ask me if Miss Olvera ever mentioned to me if there was any question about the hook on her apparatus.

“Q—That the apparatus had thrown her out.

“A—No, she never mentioned it.

“Q—She at no time stated to you that she fell from the apparatus because the apparatus was not set up properly?

“A—The first I heard of that claim was after the season was closed and she was in Baldwin Park.

“Q—Then you did hear it, didn’t you?

“A—After the season was closed. She didn’t say it to me personally; not directly. I didn’t see Miss Olvera from the time the season closed at Houston, Texas, until in this courtroom.

“Q—How long was she in Houston?

“A—I don’t recall. I think one day.

“Q—She only came there to ask you for employment?

“A—She saw the performance and was around the show visiting friends.

“Q—And you only saw her on two occasions after the accident?

“A—Yes, sir.

“Q—One was at the hospital?

“A—Yes. [318]

“Q—You have related the conversation between you there?

“A—Yes.

“Q—And the time at Houston?

“A—Yes, sir.

(Deposition of Pat Valdo)

"Q—And at that time she came to ask you for employment, didn't she?

"A—I don't recall that. You see, I do business at that time of the year with four hundred or five hundred artists, and I must depend on my letters and correspondence. It is impossible to remember the conversations.

"Q—So you don't remember the conversation at that time?

"A—So far as I remember, she did talk about the next year, and I told her that so far as I was concerned she could always have a place, and I would take it up with Mr. Gumpertz. I believe the correspondence will bear that out.

"Q—But so far as the conversation was concerned, you do not know now definitely what the whole conversation was?

"A—In a general way, yes, I do. Definitely, not.

"Q—You say that there were 100 performers with the show?

"A—Approximately.

"Q—How many acts were there?

"A—Well, that would be very difficult to say. The program is right there for that season.

"Q—Do you know?

"A—I could look at the program and tell you the exact number. [319]

"Q—I am asking you if you know.

"A—No, sir.

"Q—Could you tell approximately?

"A—Acts?

(Deposition of Pat Valdo)

“Q—Acts, yes.

“A—Well, I would have to have a little time on that.

“Q—Well, just say whether you can remember or cannot remember. You don’t remember?

“A—No.

“Redirect Examination

“Q—You said approximately 100 acts.

“A—Performers.

“Q—That is all of this witness.”

Mr. Combs: If your Honor please, at this time I would like to offer as defendants’ exhibit the contract heretofore offered by plaintiff in this matter.

The Court: You don’t need to offer it if it is already in evidence.

Mr. Combs: Very well, I would like to read it.

The Court: I recall that the contract is rather closely printed, and has two pages. I would suggest that you just read the parts that you believe are pertinent. If you think it is all pertinent, read it all.

Mr. Combs: I do think it is all pertinent, your Honor.

The Court: It may be turned over to the jury when they retire to deliberate, but use your own judgment. [320]

Mr. Combs: All right. This is Artist's Independent Contractor Agreement. I am now reading Plaintiff's Exhibit No. 1:

"This Agreement made at as of Sarasota, Fla., this 24th day of September, 1936 between Ringling Bros.-Barnum & Bailey Combined Shows, Inc., hereinafter called the Show, and

"America Olvera

hereinafter called Artist—

"Witnesseth:

"1. For the lump sum of Eighty (\$80.00)..... dollars per week, payable weekly for the season of 1937 commencing on or about ————— the Artist sells to the Show his act, and in addition to said sum accepts without charge from the Show (while under canvas) meals, car-lodging and transportation, common and customary in the circus business. The Artist represents that his act in the matter of props, apparatus, property and personnel is as hereinafter set forth; and shall be maintained as is, and as represented, throughout the season, to wit:

"(Insert names of artist, troupe members; give description and detail of act.)

"America Olvera to present balancing trapeze act of the same standard as presented during the season of 1936
"A Charge of Five Dollars Weekly Will Be Made for Each Dog or Animal Pet Carried With the Show.

"It is also agreed that if the Artist is re-engaged for [321] the following season he shall not appear at any other circus, theatre or Wild West show in the United States without the written consent of the Show.

(Plaintiff's Exhibit No. 1)

"The term 'season' represents the operating period as fixed by the Show and compensation to the Artist is definitely understood as a lump sum for the season. Because of inability of the Show to determine with exactness in advance the length of the season, installment payments to the Artist are made on a weekly basis.

"The word 'Artist' where herein used shall embrace and include his entire act inclusive of the Artist and the personnel of his troupe.

"(a) The option is given the Show to renew this contract for the next succeeding 'season' upon same terms and contract price, by giving notice to Artist 30 days prior to closing date; and the Show by agreement reserves the right to transfer and place the Artist during the term or part term of this contract, with any other of its shows or circuses—under its ownership or management—all the terms and conditions of this contract continuing, prevailing and obtaining.

"2. It is definitely understood by both parties that any changes that may from time to time be made, either in props, apparatus or personnel in the act, time of giving the act, etc., are changes exclusively under control of, and for the convenience of, the Artist, and in no particular modify or [322] restrict the Artists relations with the Show as independent contractor; and that the privileges offered Artist by the Show for meals, car-lodging and transportation are optional, of which Artist at all times has the privilege of rejecting and enjoys without restriction the freedom of procuring elsewhere or otherwise his meals, lodging and transportation.

(Plaintiff's Exhibit No. 1)

"3. Twelve performances on secular days (together with Sunday performances when given) shall constitute one week's work.

"Payment to the Artist shall be reckoned only from the date of the first public performance. The Artist shall receive no payment for rehearsals during or previous to this engagement; nor for any performances omitted, from whatever cause, during the season.

"The Show shall hold back one week's payment of the Artist as a guarantee of good faith.

"4. Upon the termination of this agreement from any cause, no claim shall be made by the Artist for the use of his or any name, lithograph, poster or other printed matter used thereafter.

"5. Animals or pets not used in performances will not be allowed or carried unless by special permit of the Show; and then only upon payment of ten dollars a week for each animal or pet so carried.

"6. The Artist shall at all times and places produce [323] and present his act to the entire satisfaction of the Show.

"7. The Artist's engagement with the Show is exclusive, and his act and presentation are represented as special, unique and extraordinary. During the contract period the Artist is prohibited from engaging or appearing with any other circus or wild west Show in the United States. For any violation of this clause, the Artist agrees that injunction or other adequate remedy restraining the Artist

(Plaintiff's Exhibit No. 1)

from performing for any other circus or wild west show before the completion of this contract, may issue out of any court of competent jurisdiction, and the Show shall be entitled as liquidated damages, to a sum equal to double the amount of the Artist's compensation for the unexpired period of contract.

"It is expressly agreed and understood that if the Show engages the Artist for the season of 1938 the Artist shall not perform in New York City between the closing of the Show of the season of 1937 and the beginning of the season of 1938 without the written consent of the Show.

"8. The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the 'act' by reason of the Artist's skill constitutes a 'feature' performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act. [324]

"The Artist shall furnish and maintain in first-class condition at his expense all paraphernalia and equipment. The Artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same.

(Plaintiff's Exhibit No. 1)

"Independent Contractor

"9. The Artist under this contract is an independent contractor, and seeks and accepts employment as such, anything herein contained to the contrary notwithstanding.

"10. The place of this contract, its status or forum is at all times Sarasota County, Florida. That in said county and State of Florida shall all matters whether sounding in contract or in tort relating to the validity, construction, interpretation and enforcement of this contract, be determined.

"11. The Artist Understands, Recognizes and Confirms that

"(a) The Show is transported by the railroad, not as common carrier, but by private arrangement and

"(b) That to affect transportation of its outfit the Show releases the railroad for claim or liability for all damages to persons or property of whatever nature, of both [325] Artist and Show; and

"(c) That the Artist in accepting from the Show meals, car-lodgings and transportation on its circus train receives special benefits of recognized value to the Artist, and that such special benefits constitute consideration to the Artist for his release of claim for damage of every nature and description that he may have during or after the period of performance, under this contract, against all transporting railroads and the Show.

(Plaintiff's Exhibit No. 1)

"12. Now, Therefore, for valuable consideration, the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants, and any transporting railroad company handling the Show's circus train movements, of and from all claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during period of performance under this contract; and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract.

"The Artist declares that he has read—heard read the foregoing contract and understands the same.

"In Witness Whereof, the above named parties have hereunto set their hands and seals. [326]

"Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

"By (Signed) S. W. Gumpertz,

(Signed) America Olvera,

Artist.

Artist's Permanent Address:

226 50th St. New York City."

Mr. Combs: We will call Mr. Thornton.

ROBERT THORNTON,

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Your full name?

A. Robert Thornton.

Direct Examination

Q. By Mr. Combs: Where do you reside?

A. 1621 Washington Boulevard, Venice.

Q. By whom are you employed at the present time?

A. At the present time I am not working; unemployed.

Q. Have you been engaged heretofore in the circus business?

A. Yes, sir.

Q. Were you at any time employed by the Barnes circus?

A. Yes.

Q. When. [327]

A. In 1907, until about 1938.

Q. Approximately 31 years?

A. Yes.

Q. Prior to that time were you in the circus business?

A. Prior to 1907?

Q. Yes.

A. I was in the carnival business.

Q. Subsequent to 1938 were you in the circus business?

A. Yes.

(Testimony of Robert Thornton)

Q. Until when?

A. Well, I was in the show business and carnival business from 1903 to 1907; in the circus business from 1907 until 1938.

Q. During all that later time you were with the Barnes circus?

A. Yes, from 1907.

Q. What was your position with the Barnes circus in 1937, when Miss Olvera's act took place?

A. I was the equestrian director.

Q. Will you explain to the jury what an equestrian director is in the circus?

A. The equestrian director has charge of the performance, to see that the acts get in and go out on time.

Q. Were you also the ringmaster?

A. The equestrian director and ringmaster is the same thing. [328]

Q. How long have you been the equestrian director?

A. Since 1912.

Q. Were you present in the big top of the Barnes circus at the time of the accident in this case?

A. Yes.

Q. Where were you then?

A. Standing behind the middle ring alongside of the band.

Q. Were you anywhere near the ring occupied by Miss Olvera at that time?

A. Well, I was standing behind the center ring, that is, about 40 feet from where she was working.

(Testimony of Robert Thornton)

Q. Was her trapeze hanging in the middle of that ring?

A. Yes, sir.

Q. On that occasion did you have an opportunity to observe her trapeze while hanging in the air, before her act?

A. Yes.

Q. Will you state to the jury what you observed in that connection?

A. Nothing out of the ordinary.

Q. Did you see Mr. Pollinger in the big top at the time Miss Olvera's trapeze was hung?

A. Yes.

Q. Where was he?

A. In there, directing the men.

Q. Which men?

A. The rigging men, put their traps up. [329]

Mr. Marcus: I move that the word "directing" be stricken as calling for his conclusion.

The Court: It may go out, and the jury instructed to disregard it.

Q. By Mr. Combs: What was he doing with relation to the men?

A. He showed the men how to hang the traps; pull them up in the air.

Q. Just how soon, or how long prior to Miss Olvera's act did Pollinger come into the tent?

A. Well, it was just before the act,—about two minutes before.

(Testimony of Robert Thornton)

Q. And what did he do when he came into the tent?

A. He waited there until it was time to set their act.

Q. And by setting their act, what do you mean?

A. When they set their act, he goes in with the rigging men; gets the blocks and falls that are hanging there from the center poles; hang their traps, and then pull them up in the air, to get them up.

Q. Part of that time are they hanging over to the side out of the way of the other performers?

Mr. Marcus: If your Honor please, that is not what the witness said.

Mr. Combs: I will withdraw the question. It is leading and suggestive.

Mr. Marcus: It is more than that. [330]

The Court: It is withdrawn. Let us not enter into a controversy.

Q. By Mr. Combs: What did Mr. Pollinger do when the trapeze was pulled up?

A. He would guy them out.

Q. This is particularly on the day of the 12th of September, 1937.

A. Well, he was there every show.

Q. Was he there every day?

A. Yes.

Q. Doing these same things?

A. Yes.

Q. Did he do anything with relation to the guy lines on the date of September 12th?

A. Well, after guying them, guying out the guy lines, he goes around shaking the guy ropes, to see if they are tight enough.

(Testimony of Robert Thornton)

Q. Subsequent to that, will you relate what transpired in connection with Miss Olvera's act? I will withdraw the question. What happened then, in so far as Pollinger was concerned, in relation to Miss Olvera's act?

A. When he gets through seeing if it is tight enough, then she goes up to do her act. He takes her cloak off, or whatever she is wearing, and she goes into the ring. He hands the cloak to the property man, and then he goes in and helps her up. [331]

Mr. Marcus: I understand, your Honor, this is directed to the date this accident happened?

Mr. Combs: That is right. That is my question.

Q. Did he do that on that day?

A. Yes.

Q. Did he do anything else other than that?

A. Then, after she gets up in the trapeze—

The Court: Mr. Thornton, this question is directed to what happened on that particular day. Did you see what he did then? Did Miss Olvera, after the matters you have referred to, get up on the trapeze?

A. Yes, sir.

The Court: Go ahead.

Q. By Mr. Combs: How did she get up on the trapeze?

A. The men pulled her up.

Q. By what means?

A. I don't remember that day whether they pulled her up in the trapeze, or whether she climbed up. Sometimes they go hand over hand, and sometimes they pull her up with her foot in the rope.

(Testimony of Robert Thornton)

Q. Did anything unusual occur on that particular day in relation to her act, that you observed?

A. No.

Q. Did anything call your attention to it toward the end of the act?

A. No. [332]

Q. Miss Olvera fell from her trapeze?

A. Yes, she fell.

Q. Explain just what you observed in that connection.

A. After that I saw her, she was on her hands and knees, swinging, then out she came.

Q. What happened to her when she came out?

A. She lit on the ground.

Q. Explain a little more fully what you mean by she came out.

A. She just fell out of the trapeze.

Q. From what part of the trapeze?

A. She was on her knees. She did the trick there; I think it was her finishing trick, when she put the handkerchief on the bar.

Mr. Marcus: I move to strike out that it was her finishing trick, as calling for a conclusion.

The Court: I don't think it is material. The motion will be denied.

A. She would go on her knees, with the bar swinging, and the handkerchief on the bar, and then she reached down and got the handkerchief with her teeth. This day she did not have the handkerchief on the bar yet when she went out of the traps.

Q. By Mr. Combs: Where did she fall?

(Testimony of Robert Thornton)

A. It was outside the net they were holding.

Q. About how far outside of the net, if you know?

[333]

A. Pretty close to nothing.

Q. One or two feet?

A. I don't think it was that far. Maybe a foot.

Q. About a foot? Did you actually see her fall?

A. Yes, sir.

Q. Where were you when you saw her?

A. Upon the ringside at the band, behind the ring.

Q. About how far away was that from where she actually fell?

A. From where I was standing to where she lit on the ground, I imagine it would be 60 feet.

Q. You say you imagine? That is your best recollection of the event?

A. Yes, sir.

Q. Immediately after her fall, what happened to the traps?

A. The traps were let down.

Q. Who did that?

A. The rigging man.

Q. How soon after she fell?

A. Well, I don't suppose over a minute.

Q. Was there any particular reason for the removal of the traps immediately?

A. No; that was the ordinary time it takes.

Q. Did you see anyone approach Miss Olvera after the fall? [334]

A. No, sir.

(Testimony of Robert Thornton)

Q. Did you hear any noise in the tent, like the cracking of a chain, about the time she fell?

A. No.

Q. Was the band playing or not on that day?

A. The band was playing.

Q. How many rings were in the circus?

A. Three rings.

Q. With the customary paraphernalia of a three-ring circus?

A. Everything was there, yes.

Q. Thousands of items of property and hundreds of individuals?

A. Yes.

Q. How many people, approximately, were in the big top?

A. The audience?

Q. Yes.

A. Well, I should say at least 4,000. That is just a rough guess. I don't know how many were in the audience. I guess that many.

Q. Was there any difference in the manner in which Miss Olvera's rigging was erected or handled on the day of September 12th, 1937, from any other day of her performances theretofore?

A. No.

Q. It was handled in the same manner? [335]

A. In the same way.

Q. Was that likewise true in relation to the net under her?

A. Yes.

(Testimony of Robert Thornton)

Q. Will you describe that net as best you can?

A. I never measured it, but I imagine it was around 8 or 9 feet square, and all the ropes and holes were around it.

Q. Held by about how many men?

A. Ten men.

Q. Did they conduct themselves in any manner different on the occasion of September 12th, 1937 than they had six months preceding that date, in Miss Olvera's performances?

A. No.

Q. Just the same? A. The same way.

Q. And where was the net located with relation to the trapeze when it was standing stationary?

A. It would be directly under her.

Mr. Marcus: That is all.

The Court: What was the purpose of the net?

A. The purpose of the net was to catch her in case she fell.

Cross Examination

Q. By Mr. Marcus: Mr. Thornton, did you testify that Mr. Pollinger came out two minutes before, or about two minutes before, Mrs. Pollinger came out to perform her act? [336] A. No.

Q. You did not testify to that a moment ago?

The Court: The record will speak for itself.

Mr. Marcus: I want to be sure, because I want to base an impeaching question on that.

(Testimony of Robert Thornton)

The Court: If there is any question about it, perhaps you had better have it read. Mr. Thornton says now he didn't say it.

Mr. Combs: Let us have the last question and answer of the witness, because the question is compound.

Mr. Marcus: Strike it out. Did you so testify on direct examination?

Q. Did Mr. Pollinger come out two minutes before Mrs. Pollinger came out to perform her act?

A. Two minutes before they got ready to set her act, yes.

Q. Did he come out before she did?

A. No; they usually came out together.

Q. Then he did not come out two minutes before she came out to perform her act?

Mr. Marcus: That is not what he said; two minutes before they set her act.

The Court: Proceed. Answer the question.

A. What is the question?

(Question read by the reporter.)

A. They both came out together. [337]

The Court: Was that when he first entered the ring?

A. No, sir, they came in about two minutes; in time to set her act; then they waited until the act previous is finished, until they go in and set their act.

Q. Did they both come in together on the day when Miss Olvera fell? A. Yes, sir.

Q. Where did they come from, Mr. Thornton?

A. They came in the middle entrance, behind the band.

Q. From outside the main tent? A. Yes.

(Testimony of Robert Thornton)

Q. Was that the first time you saw Mr. Pollinger there that afternoon?

A. When he first came in, yes, sir.

Q. When the two of them came in together?

A. Yes.

The Court: Proceed.

Q. By Mr. Marcus: One act follows the other, doesn't it, in the circus, immediately? A. Yes, sir.

Q. You were engaged in an act immediately before their act, were you not, with some zebras?

A. No, immediately before their act is the clown number.

Q. You are sure of that, are you? A. Yes.

The Court: I think you had better refer to the [338] particular day. We don't want to take up time with the general situation, unless you refer to the 12th day of September.

Q. By Mr. Marcus: On the 12th day of September?

A. Yes.

Q. Were you not engaged in a zebra act on the 12th day of September, immediately before Miss Pollinger's act?

A. Immediately before Miss Pollinger's act was a clown number.

The Court: You remember that, do you?

A. Yes, sir.

Q. That was the same day of her act?

A. Yes, the clown number worked while they were setting her act.

(Testimony of Robert Thornton)

Q. By Mr. Combs: Do you remember testifying in this case at the previous trial, in this courtroom?

A. Yes.

Mr. Marcus: What page and line?

Mr. Combs: Page 391, line 3 and following.

Mr. Marcus: I will stipulate that he testified in conformity with the transcript, line 2 to the end of the page.

Mr. Combs: "A—The zebra act worked ahead of Miss Olvera's. Before the zebra act they hung her rigging and they pulled the guy ropes over away from the zebras, then they guyed it out after the zebras got through. [339]

"Q—All right; how much before her act was the zebra act?

"A—Before?

"Q—Before the zebra act.

"A—Her act before the zebra act?

"Q—Yes,

"A—No. The zebra act was before her act.

"Q—I say how much before her act was the zebra act?

"A—About five minutes.

"Q—And you were performing in that act?

"A—With the zebras?

"Q—Yes, the zebras.

"A—Yes, sir.

"Q—Was it at that time that her apparatus was put up?

"A—Yes.

"Q—Was that before or after Bert Nelson?

"A—After.

(Testimony of Robert Thornton)

“Q—Didn’t you testify on direct examination that two minutes before her act came on that her husband came out there to pull these ropes?”

Q. Isn’t it a fact, Mr. Thornton, that Miss Olvera’s trapeze went up in the big top when that big tent was set up? A. Not the trapeze, no.

Q. It was not set up in the tent before?

A. Not the trapeze.

Q. When was the trapeze, to your knowledge, put up in the tent? [340]

A. Just before she did her act.

Q. How did they put the trapeze up in the top of the tent before she did her act?

A. The blocks and falls are already hanging there. They are put up when the tent is put up. Then they bring the blocks and falls over, and hang the trapeze on them, and pull it up in the air.

Q. Do you mean to say and to state now that her trapeze was not hanging there during the entire performance? A. No.

Q. You had nothing to do with putting it up, did you? A. I was the boss of the riggers.

Q. You had nothing to do with putting it up?

A. I had this much to do, that I was the boss of the show.

Q. You were the boss of the show?

A. The boss of the performers, and I saw that the act went in.

Q. You were the equestrian director? A. Yes.

Q. That means blowing the whistle, doesn’t it, before an act starts? A. Yes.

(Testimony of Robert Thornton)

Q. That was your duty, wasn't it? You were not boss of any performers, were you?

Mr. Combs: That is argumentative. [341]

The Court: Yes, that is argumentative.

Q. By Mr. Marcus: You remember every day that the apparatus was pulled up just a couple of minutes before she was to perform? A. Yes.

Q. And it didn't go up there at the time that the tent was put up?

A. The blocks and falls—

Q. I am talking about the trapeze.

A. The traps, no.

Q. Tell me how they hung that trapeze up there on the top of the tent, or the blocks and falls.

A. The blocks and falls are hung when they put the tent up. They bring the blocks and falls together, and put them up in the air.

Q. Where was the trapeze during the entire show?

A. Out in the back yard.

Q. Then what happened to it?

A. They would bring it in, and hang it up when she was ready to do her act.

Q. Who brings it in?

A. The property men.

Q. You saw them do that on this day? A. Yes.

Q. How long before she came on did you see them bring the trunk in? [342]

A. They have that sitting behind the ring, alongside of the band

(Testimony of Robert Thornton)

Q. The question is, how long before she did her act did you see them bring in the box?

A. I imagine five minutes before.

Q. You did see them bring it in on this particular day five minutes before, and what else did you see them do?

A. When it comes time for her act they bring the large box in and the traps, and hang it up in the air.

Q. Who hung the traps that day?

A. The rigging men.

Q. Who were they?

A. I don't remember the names.

Q. You saw them do it? A. Yes.

Q. But you don't remember their names?

A. I don't remember their names.

Q. But you saw them hang the traps? A. Yes.

Q. It was during the time you had this zebra act, was it? A. Just previous to that.

Q. When they were bringing in this box you were performing your zebra act, were you not? A. No.

Q. What else was going on in the ring at the time that Miss Olvera was performing? [343]

A. I don't remember whether there was an act in each ring or not.

Q. How is it you remember all the details about bringing in her box, and setting it up, and you don't even know whether there was another act in another ring?

Mr. Combs: I object to that as argumentative.

The Court: Sustained.

(Testimony of Robert Thornton)

Q. By Mr. Marcus: You don't remember whether there was another act in another ring or not?

A. No.

Mr. Combs: I object to that as having been already asked and answered.

The Court: It has been answered.

Q. By Mr. Marcus: What did you see Mr. Polinger do, if anything, that day?

A. He goes in with the rigging men, and shows them how to hang the rigging.

Q. Did you see that too? A. Yes.

Q. What else did you see?

A. He did that every show.

Q. This day I am talking about, did you see him do it on that day? A. Yes.

Q. What did you see him do?

A. They go in and hang the rigging. Then there are [344] four guy lines, two on each side the rigging, that are guyed down to the stakes in the ground, and he pointed to the one he wanted pulled on to tighten the trapeze.

Q. You saw him do that that day too? A. Yes.

Q. Then what?

A. When it was tight enough all he did was like that—meaning enough.

Q. By Mr. Combs: Indicating a motion with his hands.

Q. By Mr. Marcus: Yes. You saw him do that?

A. Yes.

Q. What day was that, by the way?

A. The day of the accident.

(Testimony of Robert Thornton)

Q. What day was it?

A. I just said it was the 12th.

Q. Is that the day? A. The date?

Q. That's right.

A. Well, I don't know whether it was the date or not. Only you said so.

Q. Do you remember what day of the week it was?

A. No, I don't.

Q. Go ahead, and tell me what else you saw.

A. When he got through guying out the traps, I already told you he took her cloak, and she went up to do her act.

Q. What kind of clothes did Mr. Pollinger have on? [345]

A. He had a bathrobe. What he had on underneath, I don't know.

Q. What color was the bathrobe?

A. That, I don't remember.

Q. Do you remember what color Miss Olvera's garments were?

A. No, I don't. She had quite a few of them. I don't know which one she was wearing that day.

Mr. Marcus: I presume you will stipulate he so testified, counsel, on page 395?

Mr. Combs: Yes, whatever is in the transcript, of course, counsel.

Mr. Marcus: "Q—You say he inspected the—or he went into the ring. What did he do in connection with her trapeze?

"A—He just saw that the men put it up right.

(Testimony of Robert Thornton)

"Q—What did he do?

"A—Well, that is a hard question to answer. He was in the ring with the men.

"The Court: Do you recall what you saw him do on that occasion?

"A—Well, at the time they are putting up the trapeze—

"The Court: No, I say do you recall what you saw him do on the occasion when she received her injuries?

"A—When she fell?

"The Court: Just before she fell. When you saw him come [346] into the ring there, what did he do? Do you recall what you saw him do?

"A—Well, as soon as the act is ready—

"The Court: No. On this particular occasion do you recall what you saw him do?

"A—Well, I don't quite get that question.

"The Court: Do you remember what you saw him do when he first came into the ring on the afternoon of the 12th of September, 1937, in Anthony, Kansas?

"Will you read the question, Mr. Reporter?

"(Question read by the reporter.)

"A—Well, I don't remember him doing anything out of the ordinary when he first came in, outside of—

"The Court: Do you remember what you saw him do? It isn't a question of what you don't remember, but do you remember what you saw him do?

"A—No."

Is that answer correct?

A. It must be, if it is there.

The Court: It has been stipulated that it is correct.

(Testimony of Robert Thornton)

Q. By Mr. Marcus: Is that your testimony?

The Court: It has been stipulated that he was asked those questions, and he gave those answers.

Mr. Marcus: I want to follow it up, to determine whether that answer he gave is true.

Mr. Combs: It is argumentative, your Honor. [347]

Mr. Marcus: It is part of the impeachment.

The Court: I think he has a right to ask whether or not the testimony he is now giving is correct and accurate, or whether the testimony given at the other trial was correct.

Mr. Combs: That assumes a fact not in evidence. If there appears to be any conflict the witness has a right likewise to explain his answers. I think the question is argumentative, and I object to it upon that ground.

The Court: Reframe your question, Mr. Marcus.

Q. By Mr. Marcus: Mr. Thornton, is the testimony that you gave today true, or the answers that you gave in response to the questions of the court at the last trial true?

Mr. Combs: That is objected to as argumentative. That assumes that there is a difference between the two.

The Court: It must assume that there is a difference, or it would not be a proper question.

Mr. Combs: I don't think the question is proper, your Honor.

The Court: As I recall his testimony now he stated that when Mr. Pollinger came into the ring he did certain things with reference to the apparatus; that he showed the property men, or riggers, how the trapeze should be arranged, and that he gave them some direction regarding the guy ropes; that when it had reached a certain position

(Testimony of Robert Thornton)

he held up his hand, and told them it was correct. That is my recollection [348] of his testimony.

Mr. Combs: Yes, that is my understanding of his testimony, your Honor.

The Court: And the part of the record that was read by Mr. Marcus was that he did not remember that he did anything, as I recollect it. I think perhaps the discussion of this had better be in the absence of the jury, and the court will order the jury to retire from the courtroom, and that they bear in mind the admonition of the court and return when called by the bailiff.

(The following proceedings were had in the absence of the jury):

Mr. Combs: That is not the proper manner to approach a question of that nature. It is for the jury to determine whether the witness has spoken the truth, if there is any conflict, and it is for the jury to determine whether there is a conflict. In this series of questions the court persistently asked questions, directing the witness' attention to certain things, and when the witness attempted to answer the answer was cut off by the court.

The Court: I don't know whether that is said as a criticism of the court. The court has a right at any time to ask the witness anything that is right in the presentation of the facts.

Mr. Combs: To permit a question like that by Mr. Marcus to be answered is highly improper, and it puts in the witness' [349] mouth a question for the jury to determine, to-wit, a question of fact. I can't argue any more; if the court's mind is against me, I might just as well reconcile myself to that, and sit down.

(Testimony of Robert Thornton)

The Court: Will you read the last statement, Mr. Dewing?

(Record read by the reporter.)

The Court: Do you mean as to the proper ruling?

Mr. Combs: Yes, your Honor.

The Court: The court's ruling was just about to be in your favor. You can always present anything to this court. I expect to have an open mind, and very frequently I have an opinion that a certain ruling should be made, and the argument of counsel has changed my views, because we are all attorneys, all officers of the court. As a matter of fact, I don't see why Mr. Marcus wants to ask the question, because it can only be asked as a matter of impeachment, and for no other purpose.

Mr. Marcus: I am going to withdraw the question. I was about to do it anyway, when counsel made the statement.

The Court: The court's mind is not foreclosed as to any ruling, until he is sure he is right. I don't believe you used your usual good judgment when you made that statement.

Mr. Combs: We are under some pressure, and I apologize, if anything I say is a little sharp; I don't really intend it that way.

The Court: I don't think you do. [350]

(Short recess.)

(The following proceedings were had in the presence of the jury):

The Court: The jurors are all present. Will it be so stipulated?

Mr. Combs: Yes.

(Testimony of Robert Thornton)

Mr. Marcus: We so stipulate, your Honor.

Q. Do you remembered when the zebra act, your zebra act, went on? A. Yes, sir.

Q. What acts were there prior to the zebra act?

A. If I remember right, it was the ponies. I wouldn't swear to it, though.

Q. Were there any other acts besides the pony act?

A. Before me?

Q. Before you.

A. No; if I remember right there was ponies in each ring, but I wouldn't swear whether the ponies were ahead of me or not.

Q. Miss Olvera's act followed yours, didn't it?

A. No, it did not follow me. I worked the zebras. Then there was the clown numbers, while they were setting her act.

Q. You were *a* equestrian director for some 30 years, am I correct? A. Yes.

Q. You don't remember now what the acts were at that time? [351]

A. No, I would have to have a pretty good memory to remember back a couple of years ago, and tell you just the act that was working in the circus. You have different acts every season, you know.

Q. Is it a fact that when you finished your act, the zebra act, they brought that trunk out, with the trapeze in it?

A. They did not always bring it in at the same time.

(Testimony of Robert Thornton)

Q. On this particular date?

A. On that particular day, as I was coming out of the ring, after working the zebras, while the clowns were working, they were bringing that in.

Q. You remember that distinctly now, do you, Mr Thornton? A. Yes.

Mr. Marcus: Counsel, do you stipulate that this is what he testified to, as appears in this transcript?

Mr. Combs: Yes, of course, I will stipulate, but I think you have read this all before.

“Q—you may go ahead.

“A—The zebra act worked ahead of Miss Olvera's. Before the zebra act they hung her rigging and they pulled the guy ropes over away from the zebras, then they guyed it out after the zebras got through.”

A. Yes.

Q. Is that true? [352] A. Yes.

Q. Then they brought the box out and the trapeze before the zebra act, didn't they?

A. If I remember, you asked me when they brought it in the tent.

Q. That's right. A. Yes, before the zebra act.

Q. They would have to bring it in before they hung it, wouldn't they? A. Yes.

Q. Did they bring it into the tent after your act was over? A. No, before the zebra act.

Q. Oh, before the zebra act? A. Yes.

Q. Is that correct now? A. Yes.

Q. Before the zebra act, what were you doing?

A. Standing by the bandstand.

(Testimony of Robert Thornton)

Q. Is that all? A. Yes.

Q. Do you remember anything else, besides standing by the bandstand?

A. No; that was my business, to stand by the bandstand, watching the show.

Q. On the date of this accident were you standing at the [353] grandstand?

A. Yes, the bandstand; not the grandstand.

Q. What was going on in the tent at the time?

A. Before her act?

Q. Before the zebra act.

A. Before the zebra act, if I remember right, it was the ponies. I am not sure.

Q. What? A. I think it was the pony acts.

Q. Wasn't it the pony act that went on after your act?

A. No.

Q. Now, tell me, Mr. Thornton, do you remember what happened that day at all? A. Yes.

Q. You do? A. Yes.

Q. Can you tell me now when this trapeze was brought out into the main tent?

Mr. Combs: That is objected to as having already been asked and answered many times.

The Court: Objection sustained.

Q. By Mr. Marcus: Mr. Thornton, did you see the act at all? A. The act?

Q. Yes. A. Yes. [354]

Q. Is your memory as clear of that act as it is when you stated when that trapeze was brought out?

(Testimony of Robert Thornton)

Mr. Combs: That is objected to as calling for a conclusion of the witness, and not proper cross examination.

The Court: It would not be calling for a conclusion, because we know that he would be the one to know whether his memory was as clear or not. It is argumentative. Objection sustained.

Mr. Marcus: I will withdraw that. That is all.

Redirect Examination

Q. By Mr. Combs: Mr. Thornton, you observed the trapeze immediately after Miss Olvera fell, did you not?

A. Yes, sir.

Q. How was it swinging, in what condition?

A. Just swinging straight.

Q. Was the trapeze bar level, or otherwise?

A. Level.

Mr. Combs: That is all.

Q. By Mr. Marcus: Mr. Thornton, isn't it a fact that the zebras and ponies work together?

Mr. Combs: I object to that as not proper recross examination. This has all been gone into.

The Court: Objection sustained.

Mr. Marcus: Very well. That is all.

Mr. Combs: That is all of this witness. I would like now to read the testimony of Philip LaBay, page 430, volume 4. [355]

PHILIP LA BAY,

called as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Corkery):

"Direct Examination.

"Q—By Mr. Combs: Your name is Philip LaBay and you are also known in the circus as Blackie Wallace, is that correct?

"A—Correct.

"Q—Where do you reside, Mr. Wallace?

"A—At 366 Covina Boulevard, Baldwin Park, California.

"Q—Were you at any time employed by the Barnes Circus?

"A—Yes, sir.

"Q—During what period of time?

"A—1929 until 1934, and then in 1935 I was with the Tom Mix Circus; and from 1936 until 1938 I was with the Barnes show.

"Q—Until 1938, did you say?

"A—Yes, sir.

"Q—In what capacity were you employed?

"A—The first period on the Barnes show I was a teamster, driving six and eight-horse teams, and the last period I was a property man, a rigger.

"Q—Have you had any experience as a rigger? [356]

"A—Yes, sir.

"Q—How much?

"A—About four years.

(Deposition of Philip La Bay)

“Q—Were you present with the Barnes Circus at the time the accident which is the subject matter of this action took place?

“A—Yes, sir.

“Q—Do you know America Olvera?

“A—Yes, sir.

“Q—Do you know Karl Pollinger, her husband?

“A—Yes, sir.

“Q—Have you at any time had occasion to observe or look at the trapeze and trapeze equipment belonging to Miss Olvera here in the courtroom, marked Plaintiff’s Exhibit 4?

“A—Yes, sir.

“Q—I am now referring to the trunk. When was the first time you had occasion to observe that equipment?

“A—You mean in the courtroom?

“Q—No. I mean prior to that, when you were on the Barnes show.

“A—Oh, I helped Howard Mentz put it up the first day it come.

“Q—Did you help him thereafter?

“A—No.

“Q—When next did you see the equipment after that? [357]

“A—I saw it every day.

“Q—Every day. During the course of the Barnes show you saw it every day after America Olvera had put it up the first time, is that correct?

“A—Yes.

(Deposition of Philip La Bay)

“Q—Are you familiar with the details of that equipment, that is to say, the parts of it?

“A—Yes.

“Q—Have you examined that equipment here, being Plaintiff's Exhibit 4, in the courtroom?

“A—I have.

“Q—Can you state to the jury whether or not all of that equipment is here?

“A—No, it isn't.

“Q—Can you state to the jury that part which is not here?

“A—Yes, sir.

“Q—Will you state what parts are not, and describe them to the jury.

“A—There are twelve parts that are not on the rigging. There are four guy lines, four blocks that go on the end of the guy lines, four main falls that go on the center pole.

“Q—Four main poles and a center pole?

“A—That go on the center pole.

“Q—Are there any other parts missing?

“A—The pull-up rope, that is used to pull her up with; [358] a rubber hose that goes over the bar where she sits.

“Q—The bar on which she does her act?

“A—Yes, sir.

“Q—You knew Howard Mentz?

“A—Yes, sir.

(Deposition of Philip La Bay)

“Q—Was Howard Mentz present at the Barnes show on the day America Olvera had this fall?

“A—He was there that day, but not when the accident happened. He was there for supper.

“Q—He was there when?

“A—At suppertime.

“Q—Was he crippled or incapacitated?

“A—Yes, he had his foot in a sling, or in a cast.

“Q—In a cast. How long had he been in that condition, do you know?

“A—Well, in the cast about five weeks, but he had been hurt about six weeks.

“Q—His foot had been broken by an elephant tub, is that it, or injured?

“A—I don't know. Some object fell on his foot.

“Q—On the day this accident took place did you have occasion to do anything with America Olvera's equipment?

“A—Yes, sir.

“Q—What did you do; just tell the jury in your own words what you did.

“A—I put the main falls on the bail rings in the [359] morning when we went—

“Q—What are the bail rings?

“A—They are the big rings that go around the center pole where the canvas is hung. Everything goes on that bail ring.

“Q—Then what did you do?

“A—You mean in rotation?

(Deposition of Philip La Bay)

"Q—In rotation. Everything that was done with her equipment that day. State everything you did, and how.

"A—I did other things besides put up her rigging that day.

"Q—I mean, just in reference to her rigging that day.

"A—I hung her rigging and marked it and pulled it over to the side.

"Q—What part did you hang and mark?

"A—I marked the part that goes to the center pole and put it over by the main falls so it could be pulled back.

"Q—What are the main falls?

"A—The main falls are the part that go onto the rigging.

"Q—What do you mean by the rigging?

"A—The crane bar.

"Q—What else did you do that day and at what time, with relation to her equipment?

"A—That's all.

"Q—Did you have anything to do with the erection of the [360] trapeze itself?

"A—The trapeze was on the crane bar.

"Q—The trapeze was on the crane bar that day?

"A—Yes.

"Q—Did you have it swung over to the side there?

"A—Yes. It was swung over to the left side facing the grandstand.

(Deposition of Philip La Bay)

“Q—Just explain everything that was hung there and swung over to the side. Was the crane bar there?

“A—The crane bar and the trapeze—that is, the bar she works on—the pull-up rope and the four cables were on the rigging.

“Q—That was all done prior to the opening of the show, was it?

“A—Yes, sir.

“Q—What next was done to that equipment, if anything, by you?

“A—That was all.

“Q—When next did you observe the equipment?

“A—I watched it while they were putting it up.

“Q—Who put it up?

“A—Blackie Williams.

“Q—Anyone else?

“A—Yes. All the property men that worked in the center ring.

“Q—Did you see it as it was being put up? [361]

“A—Well, I was putting up a rigging in No. 3 ring, and I glanced down there and saw they were working on it.

“Q—Was that just prior to her act?

“A—That was while the zebra act was working.

“Q—Just explain to the jury what transpired, when that part of the erection of her equipment was going on.

“A—Just before the zebras came in, an act was swung over to the center, and one boy held the cables over to one side until the zebras got through working. As soon as the zebras got out, the guy lines were taken out to the

(Deposition of Philip La Bay)

blocks that were already fastened on the stakes, and the rigging was pulled to the front and then it was pulled to the back, and that brought it back tight.

"Q—By pulling do you mean pulling with the blocks and tackles on the guy lines?

"A—Yes.

"Q—Did you observe that equipment after it had been placed in place by pulling up on the second set of guy lines?

"A—Not from the center ring.

"Q—Did you see the equipment before Miss Olvera took her position on the bar?

"A—Yes.

"Q—State to the jury just what you saw and how you looked at it.

"A—I looked at it from ring No. 3.

"Q—What did you see there? [362]

"A—I saw the rigging was in its proper place in the center and all the guy lines were on, and apparently tight, and Mr. Pollinger went out and shook one guy line to see that it was tight, and then he went over back to the bandstand and waited for his wife to go in the ring.

"Q—You saw that yourself on that occasion?

"A—Yes.

"Q—Did you see a figure 8 hook on the upper right of the crane bar tangled up at that time?

"A—No; I did not.

"Q—Could you see at that time whether or not the figure 8 hook on the upper right of the crane bar was tangled?

"A—It could have been, yes, sir.

(Deposition of Philip La Bay)

“Q—Did you see the hook that attaches to the block that holes the upper right position of the crane bar on that occasion?

“A—Yes.

“Q—Did you see whether or not it was in place?

“A—It was.

“Q—It was in place?

“A—Yes.

“Q—It was not tangled up?

“A—The hook was not tangled up.

“Q—When was the next time you looked at that equipment?

“A—I helped take it down.

“Q—Did you see Miss Olvera take her place on the [363] trapeze when she performed her act?

“A—No. I was working on another act in No. 3 ring, and my attention was given to that act.

“Q—What first drew your attention again to the trapeze equipment of America Olvera?

“A—My act had finished and I had gone to the center ring to help lift Miss America down out of her trapeze.

“Q—Was that the customary procedure, to assist in helping her down out of her act?

“A—Yes; ever since Howard got hurt.

“Q—You say you assisted in that. Did anybody else help you?

“A—Mr. Pollinger, yes.

“Q—The two of you, is that true?

“A—Yes.

(Deposition of Philip La Bay)

"Q—How long had you remained there before Miss Olvera fell?

"A—I was still walking, going to her. I was by the No. 3 center pole when she fell.

"Q—Did you observe anything on that occasion that drew your attention to her fall?

"A—Yes; I heard somebody scream.

"Q—And what did you do then?

"A—I looked over to the ring and I saw her laying there, and I looked up at the rigging to see if it was broke.

"Q—What was the condition of the rigging when you [364] looked at it at that time?

"A—Well, the bar was swinging, and I seen there was nothing broke, so I went over into the center ring.

"Q—Did you notice whether the right side of the bar was four to six inches down lower than the left side?

"A—I was standing under the rigging. I couldn't tell from there.

"Q—You couldn't tell whether it was or not?

"A—No.

"Q—Did you assist in taking down the equipment?

"A—Immediately.

"Q—By immediately, how much time? A minute or less than a minute?

"A—Approximately a minute after she fell. The rigging had started to come down.

"Q—And you participated in taking it down?

"A—Yes, sir.

"Q—Did you observe Miss Olvera after she fell?

"A—I saw that her husband was carrying her out.

(Deposition of Philip La Bay)

“Q—How soon after she fell did you observe that?

“A—She no more than hit the ground until he started over there for her.

“Q—Was she being carried out before the rigging was taken down?

“A—Yes. She was on the way out before the rigging was taken down. [365]

“Q—Did you hear her say anything at that time?

“A—No. I was talking to the men, telling them what to do.

“Q—And you didn't hear her say anything at that time?

“A—No.

“Q—You saw Miss Olvera carried out by her husband all the way, is that it?

“A—Yes.

“Q—When was the next time you saw her?

“A—I never saw her again until she came back on the show that fall.

“Q—What was the condition of the rigging at the time you went up and took it down, or at the time you took it down?

“A—It was normal.

“Q—And by normal what do you mean?

“A—I mean there was nothing broke or nothing tangled up.

“Q—What was the condition of the trapeze bar at the time you took it down? Was it level or off true?

“A—I couldn't tell from my position in the ring.

(Deposition of Philip La Bay)

"Q—What was the condition of the hook and tackle attached to the crane bar at that time?

"A—They were in place.

"Q—No further questions.

"Q—By Mr. Garrett: Prior to the time that the trapeze was hauled up, did you see Mr. Pollinger do anything else in the center ring besides what you have described here? [366]

"A—No, sir.

"Q—Will you state whether you have had any other experience in the circus business besides what you have told on Mr. Combs' direct examination?

"A—You mean from my first experience in the show business?

"Q—Yes.

"A—In 1922 I joined a small mud show, as a wire walker.

"Q—You were performing yourself?

"A—Yes, for about two years on that show.

"Q—Then where?

"A—With the M. L. Clark circus.

"Q—What did you do after that?

"A—I went to the Hagenback-Wallace Circus, and I stayed there until 1928, then I went to the Al G. Barnes Circus.

"Q—What did you do when you went with the Hagenback-Wallace Circus up until 1928?

"A—I was a teamster.

(Deposition of Philip La Bay)

"Q—What did you do with the Al G. Barnes Circus in 1928?

"A—I was a teamster.

"Q—Did you later become a property man?

"A—I went to the Tom Mix Circus as boss property man in 1935.

"Q—And after 1935?

"A—I came back to the Al G. Barnes Circus. [367]

"Q—What did you do at that time?

"A—Property man and rigger.

"Q—In 1936 what were you doing?

"A—I was on the Al G. Barnes Circus.

"Q—Doing what kind of work?

"A—Driving a team.

"Q—And in 1935, did I ask you about that?

"A—I was with the Tom Mix Circus, that year, as boss property man.

"Q—And in 1937 you went on the Barnes Circus again?

"A—Yes.

"Q—What duties did you perform then?

"A—I was property man until Howard Mentz got hurt, and then I took his place as head rigger.

"Q—Did you continue in that work until the 1937 season?

"A—Yes, sir.

"Q—With what circus?

"A—With the Al G. Barnes Circus up until 1938.

"Q—And have you been with them since?

"A—No.

"Q—You have not been employed by the Al G. Barnes Circus since 1938; is that correct?

"A—That is right.

(Deposition of Philip La Bay)

"Cross Examination

(Questions read by Mr. Marcus; answers read by Mr. Corkery): [368]

"Q—These main lines connect outside of the ring, don't they?

"A—Yes.

"Q—And the line that Mr. Pollinger helped Mrs. Pollinger up with is attached to this line outside of the ring, is it not?

"A—It was attached to the clevis at the end of the crane bar.

"Q—I mean when he got hold of it, the end of it came down on that line, didn't it?

"A—Oh, yes, but it comes below the crane.

"Q—That is right. And when he went to take hold of her to lift her up over that line, he would have to take it off of that line, wouldn't he?

"A—I don't understand.

"Q—The main line that came down.

"A—No; he did not take it off.

"Q—Well, it was on that?

"A—It is on there permanently.

"Q—And he would have to take it off of that, or at least take off whatever line was on there, to get over to the apparatus to lift her up?

"A—I don't know what you mean by taking it off.

"Q—Maybe I don't explain it right. These lines that came down off of the top of the apparatus were outside of the ring, those four lines? [369]

"A—The ends of them come down outside of the ring.

(Deposition of Philip La Bay)

“Q—On one of those lines was there an extra rope by which Mr. Pollinger helped Mrs. Pollinger up on the apparatus?

“A—No; it was not on the line.

“Q—Where was it, then?

“A—It was on the clevis at the end of the crane bar

“Q—The clevis at the end of the crane bar was on top, wasn't it?

“A—Yes.

“Q—What part of it came down? Was there a rope that came down?

“A—Yes.

“Q—Where was that fastened when it came down to the ground?

“A—It was held over to one side by the property man until Mr. Pollinger wanted it.

“Q—Was that one close to the line that was supporting the apparatus?

“A—I don't just remember.

“Q—Well, is not that the line that he took hold of at the time he shook the rigging?

“A—No. That line is slack all the time.

“Q—Well, is not that the line that was supporting the rigging that he took hold of and shook?

“A—Yes.

“Q—That is the one I mean. [370]

“A—Yes.

“Q—And that was outside of the ring?

“A—Yes.

(Deposition of Philip La Bay)

“Q—He never went inside the ring, though, did he?

“A—Well, he could have.

“Q—But he did not, though, did he?

“A—I was in ring No. 3 and I didn't see exactly what he did.

“Q—That is all.

“Redirect Examination.

(Questions read by Mr. Combs; answers read by Mr. Corkery):

“Q—Who paid your salary during the year 1937?

“A—The Al G. Barnes-Sells Floto Circus.

“Q—Where did you collect it?

“A—Sometimes at the ticket wagon and sometimes in the coaches.

“Q—Did you ever get transmittals of money from Ringling Bros. during that period of time?

“A—I never did.”

Mr. Combs: I will call Mr. Cronin. [371]

SYLVESTER CRONIN,

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Will you state your full name, please.

A. Sylvester Cronin.

Direct Examination.

Q. By Mr. Combs: What is your address, Mr. Cronin?

A. 2619 Oak Knoll, San Marino.

Q. What is your present occupation?

A. Showman.

Q. Were you ever employed by the Barnes Circus?

A. Yes, sir.

Q. During what period of time?

A. Well, I was manager of the Barnes show from '28 or '29 to the close of '37.

Q. Do you know Mr. Thornton? A. Yes.

Q. Was he employed by the Barnes show at that time?

A. Yes.

Q. In what capacity?

A. Equestrian director. He had charge of the performance.

Q. Who paid his salary?

A. The Al G. Barnes Circus.

Q. Who paid Miss Olvera's salary during the time she was with the Barnes show? [372]

A. The Al G. Barnes Circus.

Q. How long have you been in the show business?

A. Most all of my life.

(Testimony of Sylvester Cronin)

Q. Prior to 1927, when you entered the Al G. Barnes Circus as manager, what had you been doing?

A. I was with the American Circus Corporation for 19 years.

Q. 19 years prior to that time? A. Yes.

Q. In what capacity had you been?

A. Assistant manager and manager.

The Court: Will you talk louder?

A. Advertising manager and ticket seller and several different positions there.

Q. By Mr. Combs: Prior to that time you were in the circus business? A. A few years.

Q. For several other circuses?

A. You might say from about 1908 on.

Q. At the time of this accident involving Miss Olvera were you present in the big tent? A. Yes.

Q. Going back to the time when she was first employed, did you have a conversation with her then?

Mr. Marcus: Just a minute. I object to that as calling for a conclusion of the witness, when she was [373] employed.

Mr. Combs: I will withdraw the question and re-frame it.

Q. At the time Miss Olvera first came to the Barnes show did you have a conversation with her?

A. How do you mean?

Q. When did Miss Olvera first come to the Barnes show?

A. She came with us at the show in San Diego. That was the opening of our season.

(Testimony of Sylvester Cronin)

Q. Was that March, 1937? A. Yes, sir.

Q. Did you have any conversation with her at that time?

A. Well, I think she didn't get there the first day, rather. When she got there she was late.

Q. Just whether or not you had a conversation when she arrived.

A. She introduced herself, her and her husband introduced themselves to me and said that they were ready to go to work.

Q. Was that all that was said at that time and place?

A. I don't remember exactly the conversation, except that we—

Q. Referring to the date of the accident.

The Court: Let me ask you, Mr. Cronin, how long is the average show season?

A. If the season is good it runs from 28 to 30 weeks.

The Court: It usually starts in March? [374]

A. In this country, usually the middle of March.

The Court: Go ahead.

Q. By Mr. Combs: Where were you when this accident took place?

A. When the accident took place I was sitting in the reserved seats.

Q. With whom? A. Mr. Valdo.

Q. Was anyone else there?

A. That day we had some visitors from the Ringling show.

(Testimony of Sylvester Cronin)

Q. Did you have occasion at that time to observe Miss Olvera in her act?

A. While the act was going on, yes, sir, I noticed the act.

Q. You noticed the act?

A. I was in and out of the show. Mr. Valdo was there. I was sitting in the seats with him part of the time; I was in and out; and I came back just as I think she was up in her rigging; if I am not mistaken the act was just starting.

Q. Was there any thing unusual that you observed with respect to her performance on that occasion?

Mr. Marcus: I object to that as calling for his conclusion.

Q. By Mr. Combs: I will withdraw the question. Did she suffer any accident at that time?

A. Yes, sir. [375]

Q. Just relate exactly what you observed in connection with her performance of her act up to the time she fell.

A. Well, she swings her act. She was on her feet and was swinging in her act, and then she went on her knees; I think it was the handkerchief act. She picked the handkerchief up with her teeth while she was swinging, and she fell out of the rigging; fell forward.

Q. Just explain how she fell out.

A. Well, she was on her knees, and as the bar went forward she pitched out.

Q. From the front of the trapeze?

A. From the front of the trapeze.

(Testimony of Sylvester Cronin)

Q. How far were you from that point on a straight line to where she pitched out of the trapeze?

A. I would say about 40 or 45 feet; 45 feet; something like that.

Q. That is, I mean on a straight line from that point.

A. Her rigging was in the middle of the ring. The ring is 42 feet long, so it would be a little over 20 feet to the end of the ring, the ring curb, straight out. I was sitting on the first row, I think.

Q. What happened to her as she fell? Did she fall in the net, or otherwise?

A. She just missed the net.

Q. By how much?

A. It is kind of hard to remember, but I would say a [376] foot and a half or two feet.

Q. What did you do immediately then?

A. Well, I sat there. Of course, naturally I looked up at the rigging, and then her husband picked her up, and carried her out. I got up and walked around the end seat. I did not want to go across the ring, naturally. I went around the end, and went back to the doctor's tent. We have a tent behind where the doctor stays—to see if she was hurt, and how bad.

Q. Did you observe what the condition of the trapeze was when you looked at it, right after her fall?

A. It looked all right to me.

Mr. Marcus: I move that that be stricken as calling for a conclusion.

Q. By Mr. Combs: What do you mean by "all right"?

The Court: It may go out. Just answer that question Mr. Dewing.

(Question read by the reporter.)

The Court: It may go out. Just answer the question yes or no, Mr. Cronin. A. Yes.

Q. By Mr. Combs: Relate what the condition of it was. A. It looked all right.

Q. Was the trapeze bar level, or otherwise?

A. It looked level to me.

Q. Did you see any hooks, figure 8 hooks, or other hooks [377] in a disordered condition?

A. No, sir.

Q. Was it stationary or swinging at that time?

A. It was swinging a little, naturally. She just flew off of it.

Q. Did you hear any snap or noise at the time she fell? A. No, sir.

Q. Was the band playing at that time, or not?

A. I don't think the band was. That was the finish, toward the finish of her act, and at that time it usually stops.

Q. Did you observe the righthand side of the bar hanging about six inches lower than the lefthand side of the bar at that time when you looked at the trapeze?

A. No, sir.

Q. Did you have any conversation with Miss Olvera when you talked to her in the doctor's tent?

A. She wasn't in the doctor's tent.

Q. Where was she?

A. Let me refresh my memory on that. If I am not mistaken, I went back to the doctor's tent, and they had

(Testimony of Sylvester Cronin)

carried her over to the side, I think on a stretcher, and I went around toward the front to see if they had ordered an ambulance, and the boy had already ordered the ambulance, and I went back. When I came back, we were shown inside of the race track, and she was there, I think on a cot. I am [378] not positive, but I think she was waiting there for the ambulance to come to take her.

Q. Did you have any conversation with her at that time? A. No, sir.

Q. Was she conscious or unconscious then?

A. Conscious.

Q. Did you go to the hospital later to see her?

A. I went in the evening. Mr. Valdo went afterward, and a couple of people there visiting from the Ringling show, and I went up with the doctor.

Q. Did you have any conversation with her at the time you saw her in the hospital?

A. I did not see her. The nurse said she was resting and not to disturb her. We stayed there quite a little while, and her husband came out, and we went to see him. He came out.

Q. Did you hear anything said by Miss Olvera while she was lying on the ground, subsequent to her fall?

A. No, sir. Of course, I was sitting in the seat there at that time; that was when the fall happened.

Q. Do you know how long the circus tent, or the so-called big top, was on the day of the accident at Anthony, Kansas? A. How long?

Q. Yes. A. 310 feet long. [379]

(Testimony of Sylvester Cronin)

Q. Were the star back seats up on both ends of the tent on that day, if you remember?

A. If I remember right they were only up at one end. Sometimes we did not put all the seats up. I used to gauge about how the business was going to be. If it looked like it wasn't going to have such a good business, we left some of the seats down.

Q. How far was the entrance from the menagerie tent to the center ring, approximately?

A. I would say roughly 150 to 155 feet.

Q. Do you know who Philip La Bay is?

A. Yes, sir.

Q. Who is he?

A. Well, he was a rigger. We used to call him, if I am not mistaken—I knew him by the name of Ringling.

Q. Wasn't his name Blackie Wallace, his circus name?

A. I don't think so.

The Court: Will you read the answer, Mr. Dewing?

(Answer read by the reporter.)

Mr. Combs: That is all.

Cross-Examination.

Q. By Mr. Marcus: At least you witnessed part of the performance, did you, Mr. Cronin?

A. I would say part of it, yes, sir.

Q. Did you see part of Miss Olvera's performance?

A. Yes, sir. [380]

Q. Did you see all of it?

A. No, sir.

(Testimony of Sylvester Cronin)

Q. Tell me what part you did see.

A. If I am not mistaken, she was going up with her act; she was just up, when I came in.

Q. All right, tell me what part you didn't see.

A. I don't remember all her routine. I mean, the starting, where she was first put up in the ring.

The Court: You saw that?

A. No; I mean, when she went up to do the act, I didn't see her go up.

Q. By Mr. Marcus: That is not part of her act, climbing up there, is it? A. No.

Q. Tell me what part of the act you didn't see.

A. The finish of it, I would say. Maybe the first part.

Q. The first number of her act. The finish you didn't see?

A. That is, where her act would have been; I seen the finish of it, where she didn't go to finish her act, in other words.

Q. I want to know the part that you didn't see that day.

Mr. Combs: I think it has already been asked and answered.

The Court: I think it either has been answered, or it is a little uncertain.

Q. By Mr. Marcus: Did you see all of her routine from the [381] time she climbed up into the trapeze, until she fell out?

A. I would say I did, from the time she got up to the trapeze.

(Testimony of Sylvester Cronin)

Q. During all that time did you observe her act?

A. Not all the time.

Q. You were sitting and talking to Mr. Pat Valdo, were you not? A. Yes, sir.

Q. At the time she fell, did you know that was the end of her act, or not?

The Court: Well, Mr. Marcus, what do you mean by her act?

Mr. Marcus: Had she completed her routine at the time she fell?

The Court: Do you mean based on what his knowledge was of the act previously?

Mr. Marcus: That's right. I am assuming that he knew her act, your Honor. He so testified on direct examination, I believe.

The Court: Do you understand the question? If you do, you may answer.

A. To know her complete routine, I couldn't say that I know whether she put all her routine in or not that day, but as long as the act was on, I seen the finish of it.

Q. By Mr. Marcus: Do you know whether or not at the time she fell it was at the conclusion of her entire routine?

A. She did not finish it, because the finish of it was [382]to pick up the handkerchief in her mouth.

Q. And she had not done that yet, to your knowledge?

A. No; she was just getting ready to do it. She was swinging for that, if I am not mistaken. That was the finish of her act.

Q. She was just swinging for the finish then?

A. When she flew out.

(Testimony of Sylvester Cronin)

Q. Can you tell me whether or not you remember at that time what her entire routine was?

Mr. Combs: I think that has already been asked and answered. He said he did not know; that he could not say.

The Court: You may answer it.

A. Roughly, yes.

Q. By Mr. Marcus: How long did it take, approximately?

A. I would say her act ran from four to five minutes.

Q. Do you know how long her act had gone at the time she fell?

A. I couldn't say positively. I would say roughly, three minutes or three minutes and a half.

Q. That act was not completed at the time she fell?

A. No, sir.

Q. During the entire time, Mr. Cronin, was there, or did you see a net underneath her trapeze?

A. Yes, sir.

Q. Who was that net being held by?

A. The property men; probably eight or ten property men [383] were holding it.

Q. By whom were they employed?

A. By the circus.

Q. Who paid their salary? A. The circus.

Q. The Barnes Circus?

A. The Al G. Barnes Circus.

Q. What was the purpose of that net?

A. It was held underneath there, in case anybody would fall, to catch them.

(Whereupon an adjournment was taken until 10:00 o'clock a. m. the following day, Friday, January 7, 1944.)

[384]

Los Angeles, California, Friday, January 7, 1944;
10:00 a. m.

(Stipulated that the jurors were all present and in their seats).

Mr. Combs: If your Honor please, we have here a doctor who examined the plaintiff last night, and we would like to offer his evidence at this time, if we may be permitted to suspend with Mr. Cronin's testimony.

The Court: I have no objection.

Mr. Marcus: I have none whatsoever.

HUGO M. KERSTEN,

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Hugo M. Kersten.

Direct Examination

Q. By Mr. Combs: What is your occupation?

A. Physician and surgeon.

Q. Doctor, how long have you been engaged in your profession? A. 25 years.

Q. Where? A. In Los Angeles.

Q. Will you relate some of your early training and experience? [385]

A. I graduated from the medical, Chicago Northwestern, and received a diploma in medicine from the University of Southern California; I had an internship in Providence, Rhode Island; an internship in the City of Los Angeles, and then started practicing in Los Angeles.

Q. Have you practiced here ever since?

A. I have practiced here ever since.

(Testimony of Hugo M. Kersten)

Q. What is the nature of your practice?

A. General practice and surgery.

Q. What connection have you with medical associations, or what positions do you hold?

A. I am a member of the Fellows of American College of Surgery; State Board of Medical Examiners of the State of California, American Medical Association, member of the State and County Associations; different staffs in the hospitals; president of the Presbyterian Hospital, Hollywood Memorial, in this city, and others.

Q. During the course of your practice, have you ever had occasion to treat spinal injuries? A. Yes, sir.

Q. Frequently or otherwise?

A. Frequently, for my type of work.

Q. You have treated several cases of fracture of the vertebrae or spine? A. Yes, sir.

Q. Doctor, have you made an examination of America [386] Olvera? A. Yes, sir.

Q. When did that take place?

A. Late yesterday afternoon or evening.

Q. What did you do in connection with that examination? First, did you take from her a statement or case history? A. Yes, sir.

Q. Thereafter, what did you do?

A. Following that, I examined her.

Q. Will you please relate to the jury the best you can, refreshing your memory from any notes you have, if you made them, what you secured by way of information from Miss Olvera, as a case history?

A. I examined Miss Olvera yesterday afternoon, at which time she told me she was married; 35 years of age.

(Testimony of Hugo M. Kersten)

Q. How old?

A. 35 years. I asked her what her main difficulty was. She gave me a list, which I wrote down, in her own words, and they were as follows:

"1. Constant pain in the back from the mid back down along the spine, because of sitting in court the past three days;

"2. Irregular menstruation; some months she flows 30 minutes, only a small amount. Periods run from 40 to 60 days apart. The longest one was for one-half day, and most always they were with pain; [387]

3. The right leg, she said had no feeling in part of it;

4. The left shoulder was lower than the right shoulder;

5. The right leg, she said, was shorter than the left leg;

6. Limitation of action of the right foot. She could not extend it down to the floor;

7. Eyesight is changed since her accident. Now she has to wear glasses for reading;

8. Left arm hurts in bad weather since her accident, and she said that all of the above conditions are present, and have been present since the accident which occurred on September 12, 1937, in Anthony, Kansas, while performing for the circus, at which time she fell approximately 22 feet to the ground.

She was treated then at Anthony, Kansas, by a doctor who placed her in the hospital, took X-rays, and kept her in bed. She was treated symptomatically at this place, and at the end of five days she joined her husband, at her own insistence, to follow the circus, going by train from Anthony, Kansas, to Amarillo, Texas, and at that time

(Testimony of Hugo M. Kersten)

she was placed in bed, in an auto court, and cared for by her husband. From that time on she traveled with the circus, under her husband's care, until they reached Baldwin Park, California. And I do not recall that date, nor do I have it down. I believe it was in November, of the same year. [388]

After arriving at Baldwin Park, California, she sought the help of an osteopathic woman doctor in Hollywood, who cared for her on several occasions, after which she made a change to another woman osteopathic doctor, who cared for her off and on for the following three years. The first thing which this latter woman doctor requested were X-rays, which were taken at the Wilshire Hospital, in this city. At that time the doctor treated her by means of lights and massage, compresses, hypodermic injections, and vitamins. Also gave her uterine treatments, and pelvic treatments.

The husband about that time made a brace for his wife, which up to that time was apparently the only brace which they had made, with the exception of an improvised brace which they described as made by the doctor, consisting of three boards which she found to give her considerable comfort, when she was lying down, particularly at night. These three boards hooked over the top, to keep her in a cradle-like fashion, and when in that position, and with that protecting covering of the board, she was always comfortable. The woman doctor did not order this brace, but the husband made it, improvised it himself. No other doctor has cared for this lady since that time.

She said that she had had all of the childhood diseases, including malaria, and had been operated on for appendicitis 18 years previously. She was pregnant at one time,

(Testimony of Hugo M. Kersten)

and had a miscarriage at three months. She stated further she [389] now sleeps on a hard bed, of her own choice, but she refused to go to the General Hospital, or any other place where she might obtain some relief.

Q. Will you proceed, Doctor, and inform us of the nature and extent of your physical examination?

A. The physical examination revealed a female 5 feet 3 inches tall, weighing 142 pounds; hemoglobin 60%; blood pressure 108 over 70; pulse rate 78. Her eyes reacted normally to light and accommodation; the ears were normal; sinuses were clear. There were several dead teeth in her mouth, and quite a few of them had been filled, obviously needing dental help. The throat was clear; the neck was negative, and no glands were palpable in the neck. The breasts were well developed, containing no glands. The chest was clear throughout. The head was regular in size, shape and function. The abdomen was pendulous, flabby, fat.

There was a scar over McBurney's point, in the lower right abdomen, and the entire lower part of the abdomen was tender to pressure. The vaginal examination showed a marital outlet. The cervix was lacerated. The uterus was retroflexed, 3 degrees to the right; the tubes and right ovary were enmeshed, tender; the right extremity was 32 inches long, well developed; no tenderness. The circumference above the mid-knee was $19\frac{1}{4}$ centimeters, below the knee, at the mid-calf was 14 centimeters. There was an area of lessened sensation in the right leg over the [390] anterior and lateral portion of the leg, from the middle foreleg to the lower one-third of the same leg. The left leg was 32.8 inches long; was $19\frac{1}{4}$ centimeters above the knee in circumference, the mid portion, and

(Testimony of Hugo M. Kersten)

13 $\frac{7}{8}$ circumference in the mid portion of the calf. She was unable to extend the foot, or to flex the same to any appreciable degree.

The reflexes on both sides were equal. The back showed a slight deviation of the mid-dorsal region of the spine; the area approximating the twelfth dorsal, and first and second lumbar vertebrae, slightly to the left, with muscular spasms on both sides, more so on the right side. No muscular atrophy on either side. She complained of pain on motion of the back. The muscular coordination of the right leg was diminished somewhat. A blood Wassermann was taken, but time did not permit to have any check-up of the X-rays taken of the back at that time.

Q. Now, Doctor, in the light of your examination of this woman, have you come to a conclusion respecting her condition?

A. With the help of the X-rays, which I have partly examined this morning. I have not concluded the examination of those X-rays.

Q. You have commenced to examine the X-rays, but have not concluded your examination?

A. That is correct. [391]

Q. Can you do so on the stand? A. Yes, sir.

Q. May we have that shadow box for these X-rays?

A. This film was taken 5-13-38, and shows a fracture of the twelfth dorsal vertebra, and the first and second lumbar; compression fracture. By compression fracture we mean a fracture which has been occasioned or caused by a sudden impact of some kind. It compresses the spinous processes together. This picture was taken 10-11-38—October, 1938, the same year, and shows the

(Testimony of Hugo M. Kersten)

same vertebrae that had been previously shown, but there is quite an improvement in the filling out of the vertebrae. Take this one, for instance—

Q. Which one are you referring to, Doctor?

A. The first lumbar. I am pointing to the vertebrae, a sort of a disk-like effect in here, cone-shaped. This has filled out, which shows a process of healing. The second lumbar also shows a process of healing by being filled out from this portion to here. The twelfth dorsal still shows compression in the upper portion.

These are the lateral views of this back, and they show the condition much more vividly than do the anterior-posterior views. The anterior-posterior views, taken on the same date, that is, October 11, 1938, looking to the back, and straight through the spine anteriorly from the front to back, show that the anterior condition of these vertebrae are in pretty fair shape, with the exception of the twelfth dorsal, [392] which is not filled out. The spinous processes on both sides are intact. The X-ray, otherwise, is within quite normal proportions.

Q. Have you completed your examination of these X-rays, Doctor? A. Yes, sir.

Q. I take it you have no more recent X-rays to examine than those indicated here?

A. I do not have any more recent X-rays.

Q. As a result of your examination of these X-rays, and of your personal physical examination of Miss Olvera, and her statement of the history of her case, have you come to a conclusion respecting her physical condition at the present time? A. Yes, sir.

(Testimony of Hugo M. Kersten)

Q. Will you relate to the jury in your own words what that conclusion is, Doctor?

A. I think that this patient has a severe physical and mental strain and pain. She has had an injury to her back which has improved, probably not completely. Had that injury been treated according to the recognized way of treatment, I think she would be in better shape today than she is. She at the present time is suffering mentally and physically probably from a glandular dyscrasia. By that I mean a derangement of the glandular system, and particularly the thyroid and the function of the ovaries. I think that [393] accounts for her irregular menstruation.

I think she is potentially what is called a hypothyroid. By that I mean a decreased secretion of the thyroid gland, which is the activator of all other glands in the system. That condition can come on any time, whether they have had an accident or not.

The function of the right ovary is very much impaired, because of her condition in the pelvis. However, she has the left ovary in good condition. She has some teeth which are dead, and can cause an absorptive condition in her system. She has a back which shows muscular spasm, and by that I mean nature's own assistance to protect and guard an area which the patient is conscious of, whether it is a mental consciousness over a long period of time, or whether it is due to active pathology; and she has had an active pathology in this place, and that of course, is a question. She could overcome that muscular spasm, and discomfort, in the back, even at the present time by wearing a proper support, which she is not doing. She is wearing a support but not a proper support for complete relief.

(Testimony of Hugo M. Kersten)

She had an area over the skin of the right leg, which shows a lack of appreciation of pain sensation, by pricks with a pin, which is due to a superficial nerve disturbance. That probably is caused by—

The Court: Doctor, -was that a complete anesthesia over that area? [394]

A. For a small portion, there is a superficial anesthesia, that could be occasioned by a nerve involved, which could be toxic in origin, or pressure—pressure emanating from the sinus processes. The lack of coordination in the right leg, affecting the foot and toes directly, is a lack of muscular coordination, which is, based, of course, on nerve enervations, which can also be due to pressure on the nerve, and due to an old trauma, too.

Q. By Mr. Combs: Doctor, what in your opinion should be the treatment in this situation?

A. This patient should at this late time have proper treatment. By proper treatment, I mean, first of all, a thorough and complete study of her general physical condition; a study of the glandular system; and the removing of any foci of teeth or infected tubes. She should have, as a result of this trauma to her back, another complete and careful physical X-ray study. She should have possible surgical relief by means of a bone grafting operation on that spine. I am making that statement with apologies, because I would much prefer making the statement after examining the recent X-rays, but that would be my impression from my study of the case and these X-rays, which I have had the advantage of seeing.

The Court: What do you think would be the result of such treatment?

(Testimony of Hugo M. Kersten)

A. Judging from the cases I have seen in the past, it [395] would have very good results.

Q. Over how long a period of time do you think it would take, for doing all the things you suggest, including the surgery?

A. I would at least allow a year to a year and a half.

Q. What do you think would be the cost of the same?

A. The cost is hard to state. She would have to be in the hospital, and have to be on her back in the hospital on a hyperextended frame; that can be a frame or plaster cast, for a period of eight weeks, and possibly two more weeks—possibly ten weeks, and she would thereafter have to wear a properly fitted and constructed brace. She should have a brace which will put support under her armpits, and such as to lift the spinal column off of itself. She would have to wear a type of brace which consisted of a light weight steel up and down the back, and two steel bars in front.

Q. That should be made by an expert of long experience?

A. It would be made by a bracemaker. I have one on myself, which I wear for a broken back. That cost me \$47.90. She should have physiotherapy treatments, and massage treatments following that, and during a period for probably a month, following the removal from the cast, if she is in a cast. She should have massage and physiotherapy to her right leg. I think with that, and with other proper constructive treatments,—I mean general constructive treatments, in the case of her general health, I think we can [396] assume she could regain a fairly active state in life.

(Testimony of Hugo M. Kersten)

Q. Do you include in that the surgery which you have referred to, and bone grafting?

A. That would come after. That would come directly after the hyperextension and the cast which follows the surgery. I don't mean by a fairly active life, to follow the trapeze business. She would be a useful citizen.

Q. By doing the normal tasks about the house, and in daily life? A. I think so.

Q. Would she be able to follow such employment?

A. Yes.

Q. By Mr. Combs: Except she could not be employed in the work of the trapeze performer?

A. No, not things of that type.

Q. Does a hypothyroid condition she possesses, in your opinion, result from this injury? A. No.

Q. Are the infected tubes and ovary in the vaginal region due to this accident?

A. Not the infected tubes, on the right side only. I know that has no connection with the accident.

Q. I take it, you did not observe anything abnormal in the pelvis? A. Not in the pelvis.

Q. Other than what you stated? [397]

A. In the pelvis. She has a retroverted uterus; a third degree retroversion.

Q. This illness you have referred to, is that due to this accident? A. No.

Mr. Marcus: The third degree—did you mention something about a third degree?

A. Yes, a third degree retroversion. It is falling of the uterus, which can come from relaxed ligaments; it can come from heavy work; it can come from a fall. If so,

(Testimony of Hugo M. Kersten)

it is easily replaced, and stays back in place. A retroverted uterus of this type usually occurs in an individual who has relaxed ligaments, and poor bodily muscular tone in certain portions of her body. That usually happens in glandular dyscrasia, due to the weight of something dragging it down.

Q. Can that condition be corrected?

A. Surgically, yes, sir.

Q. You stated that she complained of one leg being shorter than the other. Did you measure the leg?

A. Yes. It was one-eighth of an inch shorter.

Q. Which one? A. The right leg.

Q. The course of the treatment that will be indicated—you have indicated the treatment you would give now?

A. Yes.

Q. Doctor, if this patient had been brought to you [398] immediately after the fall which she had at Anthony, Kansas, would you relate to the jury what course of treatment you would have given her at that time and place?

A. I will speak of a similar case. If I had had a case of that nature, which had a fall of that type, I would, first of all, have attempted to make a complete diagnosis, and use every means at my command to effect such purpose. Certainly I would have gotten X-rays, and if the X-rays had shown that the individual had this misfortune; and she had a fracture of the twelfth dorsal, and the first and second lumbar vertebrae, I would have placed her in a hyperextension cast, and put her on her back, with the back of the head down, and the feet down. That could be done by using a brace, or by putting her in a plaster cast. If there were a great deal of compression in the

(Testimony of Hugo M. Kersten)

fracture, I would have put an extension on, so as to help nature hold the two portions of the spine apart. If the conditions at that time had appeared from the X-rays that an extension would not have been indicated, then lying on the back would have been sufficient treatment. I would have kept that portion of the body hyperextended for at least two months. I would have checked during that time by X-rays, as to her progress; I would have checked at that time by means of posterior-anterior and lateral X-rays of the spine, and if a sufficient improvement had ensued, and the vertebrae had shown as much improvement as we usually expect, then I would have taken her [399] out of the cast, and out of the hyperextension, and put her in a supportive style brace, which would relieve the pressure on the spine by virtue of the fact that she was encased in a steel brace, and was given support under the arms. In treating the spine and pelvis we ordinarily would expect that amount of progress. In some people, due to extraneous reasons, or causes, such as lack of proper chemistry in their body, lack of sufficient and proper vitamins, lack of certain glandular secretions, such as the thyroid, these people are slower in recuperating, and slower in healing. That is true of the soft tissue, as well as the bony tissue.

Therefore, the period of treatment in such case would, and could be longer. Some patients, if they had outside extraneous causes, might possibly have to stay in the cast twice as long as the normal healthy individual. Following that the patient would get up and wear the brace. I would, by the way, have had her stay on a hard bed for at least three or four months following that; any hard bed, one that was made of boards across the springs and

(Testimony of Hugo M. Kersten)

mattress. She should have massage treatments to her back and forehead, and even heat treatments, and then if the patient feels below par, for any of the conditions referred to a few minutes before, I would continue to build up her health generally.

Q. Given that course of treatment is there recovery from this type of fracture? [400]

A. From this type of fracture there is ordinarily complete recovery.

Q. You have observed complete recovery from that course of treatment, within your own personal experience, have you not?

A. I have, many of them.

The Court: In what sense do you use the term "complete recovery?"

A. Complete physical recovery; complete recovery of the fractured bone, and the functioning power thereof in connection therewith.

The Court: Entire recovery of function?

A. Yes.

Q. By Mr. Combs: The course of treatment followed by Miss Olvera, to-wit, being moved from the hospital within a week after the accident, and then treated in the manner indicated by the history, would that have any effect on the speed of her recovery?

A. I would say that was not the best treatment.

Q. Would you say it was good or bad treatment?

A. I would say it was not the recognized treatment among the medical profession in this locality.

Mr. Combs: That is all. You may cross examine.

Mr. Marcus: Thank you Doctor. There will be no cross examination. [401]

SYLVESTER CRONIN, recalled

Cross-Examination, resumed

Q. By Mr. Marcus: Mr. Cronin, do you know how Miss Olvera came to the Barnes show?

A. Only in a rough way.

Q. You did not employ her, did you?

A. No, sir.

Q. Do you know who did?

A. Mr. Gumpertz; I understand he signed her contract.

Q. Who is Mr. Gumpertz?

A. General manager of Ringling-Barnum & Bailey Show; also the other show, the Barnes show.

Q. He was general manager of the Ringling show and Barnes show? A. Overseeing the Barnes show.

Q. You managed the Barnes show? A. Yes.

Q. He was your superior? A. Yes.

Q. Would you recognize his signature if you would see it? A. I haven't seen it for seven years or so.

Q. By the way, Mr. Gumpertz sent you her contract, didn't he? A. I think he did.

Q. Look at the signature on the back of it, and tell me if that isn't the same Mr. Gumpertz you have referred to as [402] being your superior, and the general manager of your show and of the Ringling show.

A. I would say it is. It looks like it.

Q. Do you remember whether or not this is the contract that was sent you by Mr. Gumpertz?

A. No, sir, I don't.

Q. You were sent a contract, however, were you not?

A. Yes, sir.

(Testimony of Sylvester Cronin)

Q. She continued to work with the Barnes show, did she, on that itinerary, under this Ringling contract?

A. Yes.

Q. And you paid her the same salary?

A. Yes, sir.

Q. You had how many riggers, Mr. Cronin?

A. I don't remember the exact number at that time.

Q. Can you give us some estimate.

A. They usually ran from six to eight.

Q. Do you remember having a Howard Mentz at that time in your employ? A. Yes, sir.

Q. Was he a rigger? A. He was a rigger, yes.

Q. Was he what you call the boss rigger?

A. I think he was. Pardon me; not that day. He had had an accident, and he was not working at that time.

Q. And he was not there when the rigging went up either, [403] was he?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, and not within the knowledge of this man.

Mr. Marcus: If he knows.

The Court: Overruled. You may answer.

A. Give me the question again.

The Court: Read the question.

(Question read by the reporter.)

A. I don't know.

Q. By Mr. Marcus: Was Howard Mentz, prior to the date of the accident, the boss rigger?

A. Yes, sir.

(Testimony of Sylvester Cronin)

Q. How many prop men did you have?

A. I don't remember the exact amount. It varied. Sometimes there would be a few drop, off and on; I don't remember who had charge of this department. I only consulted them in case there was something special.

Q. You were over all of these different bosses, weren't you?

A. Yes, sir.

Q. Do you remember who the prop man boss was?

A. I think it was Blackie Williams.

Q. Is he in court now?

A. No, sir.

Q. Tell us what the duties of the riggers were, to your knowledge, Mr. Cronin. [404]

A. They were to put the props up for the different acts, that is, the aerial stuff.

Q. Tell me, if you know, when the props for America's act went up.

A. I don't know the exact time. It all depends on how the work was; how busy they were; whether we were; in town on time. If we were a little late, naturally it varied.

Q. It varied as to the time it went up?

A. It was ready for the doors to be open.

Q. In other words, it all depended, did it, as to when you came into town, and when you unloaded the trains?

A. As fast as the tents was up, they got the props.

Q. In other words, the props went up when the tents went up?

A. Not all of them.

Q. Which ones went up?

A. I don't remember the exact ones. I wasn't in there enough to see them.

(Testimony of Sylvester Cronin)

Q. Confine yourself to Miss America's rigging. Do you know that the rings and blocks went up when the main tent went up?

The Court: Will you read the question, please?

(Question read by the reporter.)

A. After the tents are up the riggers usually put their falls up; then they fasten the apparatus and things later on.

Q. By Mr. Marcus: Do you know, Mr. Cronin, whether or not [405] Miss Olvera's trapeze went up before the show started?

A. Well, it would have to go up before the show started; that is, before her act, rather.

Q. I mean before the circus show started.

A. Whether her trapeze was up before the show started?

Q. That's right.

A. I don't know. They never did put them up that early. There was the falls; they were fastened, and the riggers fastened their props onto the falls. As a rule, they were put up usually before the act.

Q. Do you mean the apparatus, the trapeze itself?

A. I was never in there all the time. I couldn't tell positively just what time they was put up.

Q. You have seen the performance many times, I presume, before the accident? A. Yes, sir.

Q. Did you see it from the beginning?

A. At that day?

Q. No, prior to that day.

A. Do you mean did I see the whole show through?

(Testimony of Sylvester Cronin)

Q. That's right.

A. I don't know if I even seen the whole performance through.

Q. By the Court: You are referring to Miss Olvera's act only?

Mr. Marcus: No, your Honor. [406]

The Court: Do you mean the entire show?

Mr. Marcus: That's right.

The Witness: May I explain?

The Court: Yes, you may.

A. Being manager of the show I was on the go from the front to the back all the time. I was never in one place as a rule all the time.

Q. By the Court: You mean you never sat through the entire performance?

A. From start to finish, except it would be dress rehearsal before the opening the first day.

Q. But you were in and out of the show at all times during the performance of your work as manager?

A. Yes, your Honor.

Q. By Mr. Marcus: On this particular day do you remember Mr. Pat Valdo being there? A. Yes sir.

Q. Who else was there with him?

A. Well, the Ringling show happened to be close to us on that day. This was on Monday. I don't think they worked that Sunday. There was four or five visitors over from the Ringling show.

Q. Do you remember this boy who gave his name as Yacopi? Do you remember his being one of the visitors there that day? A. I don't remember him.

(Testimony of Sylvester Cronin)

Q. But you do remember there were several visitors?
[407]

A. Yes. That day Mr. Valdo came over, and Mickey Blue, the boss property man with the Ringling show, Mr. Braden, the equestrian director, and his wife; and there were some other people there; I don't know who they were.

Q. Did they go into the circus prior to the time the show started?

A. I suppose they were sitting in the seats when the show started. I suppose they came from the dressing room. As a rule, when performers visit another show they go back to what we call the back yard and visit among the people, and come in when the show is ready to start.

Q. Do you have any independent recollection at this time as to whether Mr. Pat Valdo and yourself went into the main tent prior to the time the show started?

A. We went in just about the time the show started and sat down in the seats. I was with him a few minutes.

Q. Do you remember looking around and seeing a trapeze up there at that time?

A. I don't remember.

Q. You don't remember whether it was up or not?

A. That early?

Q. At that time. A. No.

Q. But you do remember, however, seeing her on the trapeze? A. Yes, sir. [408]

Q. Do you remember who the prop boys were?

A. I don't remember.

Q. You say that they came and went quite often?

A. Yes.

(Testimony of Sylvester Cronin)

Q. Sometimes you had more; sometimes less?

A. We had what we call in the job our foundation men practically there all the time; and they need an extra man, and they drop him, and they fill in; but the riggers were usually there all the time.

Q. Who paid the riggers? A. The circus.

Q. Who paid the prop men? A. The circus.

Q. Were these prop men that held the net?

A. Riggers, do you mean?

Q. No, prop men.

A. Prop men and riggers both used to hold. We had three rings; sometimes they would be getting the acts ready in the different rings. The prop department, if I am not mistaken, was allowed 27 or 37 men when they had full crews.

The Court: You want to find out who paid the men that held the net?

Mr. Marcus: Yes.

The Court: I wish you would find out, Mr. Marcus. You are taking too much time on cross-examination.

Mr. Marcus: I am sorry. [409]

Q. Mr. Cronin, did you watch them when they held the net that day? A. Yes, sir.

Q. You saw her fall, you stated on direct examination?

A. Yes.

Q. She fell about a foot and a half or two feet from the net? A. I would say that, roughly.

Q. And you saw the net did not move?

A. The net move forward?

(Testimony of Sylvester Cronin)

Q. Move any way.

A. I don't remember. The net was right under the act. That's where they placed it, so in case she should fall.

Q. You don't remember seeing the net moving, do you?

A. No, sir.

Mr. Marcus: That is all.

Mr. Combs: No redirect.

(The Court after admonishing the jury here took a short recess.)

Mr. Combs: We want to read the testimony of Howard Mentz, your Honor. Mr. Corkery, would you be kind enough to take the stand?

(Questions read by Mr. Combs; answers read by Mr. Corkery.)

Mr. Combs: Deposition of

HOWARD MENTZ.

"Q—What is your name? [410]

"A—Howard Mentz.

"Q—What is your age?

"A—31 years.

"Q—Where do you reside?

"A—Tampa, Florida.

"Q—Do you reside there at present?

"A—Yes.

"Q—Is that your permanent home?

"A—No.

"Q—Do you expect to be residing there on January 16, 1940?

"A—I do not know.

"Q—Will you be in California during the month of January, 1940?

"A—I don't know that either.

"Q—Where will you be then?

"A—Probably Tampa. I don't know.

"Q—What is your occupation?

"A—Rigger.

"Q—How long have you been engaged in that occupation?

"A—Ten years.

"Q—State with whom you have been employed as a rigger.

"A—Al G. Barnes Circus, Sells Floto Circus.

"Q—State the periods of time you have been so employed and for whom employed during said periods of time.

"A—Sells Floto Circus 1929 to 1930; Al G. Barnes Circus [411] 1930 to 1938.

"Q—Explain what you did as rigger for the Al G. Barnes-Sells Floto Combined Circus.

"A—On the Sells Floto Circus I put up performers' riggings and worked props; on the Al G. Barnes circus I superintended putting up riggings and put up riggings myself. Of course, in both cases—"

The Court: When the court first stated the names of the defendants, I think I was referring to the original complaint, and I believe the Sells-Floto Circus, as a defendant, was dismissed by stipulation in this case.

(Deposition of Howard Mentz)

Mr. Combs: Yes; but I think the witness here was testifying as a foundation.

The Court: That is all right; but I was trying to correct the statement of the court.

Mr. Combs: Yes, the defendants are Ringling Bros. and Al G. Barnes Amusement Company.

“Q—Is that the circus operated during the 1937 by the Al G. Barnes Amusement Co.?

“A—I don’t know the name of the corporation that owns the circus. We called it the Al G. Barnes show.

“Q—Did you work for them as a rigger?

“A—Yes.

“Q—For what period of time?

“A—1930 to 1938.

“Q—Do you work as a rigger now? [412]

“A—No.

“Q—What did you do for the Al G. Barnes Amusement Co. when you worked for them as a rigger?

“A—I superintended the erection of the riggings which was—

“Q—What did you do for anyone else as a rigger?

“A—Nothing except as I have testified before.

“Q—Did you work for the Al G. Barnes Amusement Co. on September 12, 1937, as a rigger?

“A—I was employed by them and superintended riggings at that time but had recently broken my ankle and did no actual work on that day.

“Q—Did you know America Olvera Pollinger, the plaintiff in this action?

“A—Yes.

(Deposition of Howard Mentz)

"Q—When did you first meet her?

"A—At the opening of the 1937 season in March when she came on the Al G. Barnes show.

"Q—Did you ever act as a rigger for her?

"A—Yes.

"Q—Did you ever act as a rigger on any equipment used by America Olvera Pollinger?

"A—Yes.

"Q—State at what times you acted as a rigger for America Olvera Pollinger.

"A—From the opening of the 1937 season until I broke my [413] ankle in July or August 1937 and then I superintended the erection of her rigging but did no actual work.

"Q—What were you doing on the date of September 12, 1937?

"A—I was with the circus and watched the show at the afternoon performance.

"Q—Did you act as a rigger for America Olvera Pollinger on that day?

"A—I superintended putting up her riggings that day but did no actual work. I was on crutches as I was still suffering from a broken ankle.

"Q—Was the rigging used by America Olvera Pollinger on September 12, 1937, the same rigging used by her during the entire show season of 1937, previous and up to September, 12, 1937?

"A—Yes.

(Deposition of Howard Mentz)

"Q—Did you do anything in the erection of the America Olvera Pollinger equipment or rigging on that day?

"A—I superintended putting up her riggings that day but no actual work.

"Q—Did you observe America Olvera Pollinger perform her act on the 12th of September, 1937?

"A—I did.

"Q—Did you know Carl Pollinger?

"A—Yes.

"Q—When did you first meet him? [414]

"A—The same time I met her, at the beginning of the season.

"Q—In what connection?

"A—We were both employees of the same circus.

"Q—Was he present at Anthony, Kansas, on September 12, 1937?

"A—Yes.

"Q—Do you know what he was doing at that time?

"A—He had an act with the circus.

"Q—Did he participate in or help you in putting up America Olvera Pollinger's rigging on September 12, 1937?

"A—No.

"Q—What did he do in that connection?

"A—He did nothing in that connection.

"Q—Did he help America Olvera Pollinger perform her act that day?

"A—Yes.

"Q—What did he do in that connection?

"A—He assisted her in her act. He pulled her up in her trapeze on a rope and swung her after she got in the trapeze

(Deposition of Howard Mentz)

"Q—Did you see America Olvera Pollinger on said date at or about the hour of 3:30?

"A—Yes.

"Q—What was she doing?

"A—Getting ready for her act.

"Q—What occurred? [415]

"A—She stood in the connection by the bandstand and was having conversation with the boss property man and a few others. She walked over with her husband and the boss property man and looked over the rigging. She signaled to the boss property man for adjustments to be made in the rigging—to level it—which was then done. She then walked into the ring to begin her act.

"Q—Relate in detail exactly what transpired with relation to America Olvera Pollinger's act on the trapeze.

"A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then swung the trapeze both sideways and forward; she then got into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her month from the trapeze bar and was at the front of her swing when she lost her balance and fell to the ground.

"Q—State where you stood.

"A—I didn't stand. I was sitting about half way up in the reserved seats on the end of a row directly opposite the center ring over which she was doing her act.

"Q—State exactly and in complete detail, everything you saw.

"A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then

(Deposition of Howard Mentz)

swung [416] the trapeze both sideways and forward; she then got into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her mouth from the trapeze bar and was at the front of her swing when she lost her balance and fell to the ground—

“Q—Finish the answer.

“A—(Continuing) Her husband, with a number of other men, rushed to her and her husband picked her up assisted by a few more property men and they rushed her out of the main tent. They came right by me where I was sitting and she appeared to me to be unconscious.

“Q—Who else was there?

“A—A number of people.

“Q—Give their names.

“A—I remember Mr. Pollinger, Blackie Williams, Superintendent of Props, Jose Horton, Thomas Parsons, Philip LaBay, Chandler Miller, Robert Thornton, and probably other whose names I cannot now remember.

“Q—When America Olvera Pollinger fell, what occurred?

“A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then swung the trapeze both sideways and forward; she then got into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on [417] the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her mouth from the trapeze bar and was at the front of her swing when she lost her balance and

(Deposition of Howard Mentz)

fell to the ground. Her husband, with a number of other men, rushed to her and her husband picked her up assisted by a few more property men and they rushed her out of the main tent. They came right by me where I was sitting and she appeared to me to be unconscious.

“Q—Was anything said by America Olvera Pollinger at that time?

“A—No, I didn’t hear her say anything; she appeared to me to be unconscious.

“Q—Now you may relate exactly what was said by you and what was said by America Olvera Pollinger, and what was said by Carl Pollinger and any other persons there in the presence of America Olvera Pollinger.

“A—I didn’t hear them say anything; they were busy rushing her out of the tent.

“Q—State the names of the individuals in so far as you can remember them, who helped in the erection of America Olvera Pollinger’s rigging on September 12, 1937?

“A—A boy who we called Whitie and other employees whose names I do not remember.

“Q—Do you know whether or not the America Olvera Pollinger rigging was inspected after erected on September 12, 1937, prior to her going on in her act? [418]

“A—Yes.

“Q—Who inspected it?

“A—She and her husband inspected it.

“Q—What was done in that connection?

“A—She and her husband looked it over and she signaled to the boss property man to level off her rigging.

(Deposition of Howard Mentz)

“Q—Can you state what the condition of the rigging was at that time?

“A—It was very good.

“Q—Relate exactly how it looked when it was in the air.

“A—It looked level and in the same condition it always was.

“Q—Describe in detail the position of each guy rope, hook, eye, clevis, cable, wire, cross bar, or other portion of the equipment.

“A—The trapeze bar upon which she stands or sits when she performs her act is a steel bar $\frac{7}{8}$ of an inch thick and about four feet long. It is suspended from a bar known as the crane bar by steel cables $\frac{3}{8}$ or $\frac{1}{2}$ inch thick. These cables are attached to the crane bar by means of metal hooks known as sister hooks or marine hooks, these hooks being in the form of a figure eight. These cables are about $10\frac{1}{2}$ feet long and instead of being attached directly to the trapeze bar are attached to solid steel bars about $\frac{1}{2}$ inch thick and $1\frac{1}{2}$ feet long which in turn are attached to the trapeze bar at right angles making the total distance from [419] the crane bar to the trapeze bar about 12 feet. The crane bar is a metal tube about $1\frac{1}{2}$ inches in diameter and about 5 feet long. It is suspended by means of ropes and pulleys from metal bail rings which are attached to the center poles which hold up the tent. The crane bar is kept steady by means of four quarter inch steel cables known as guy lines which in turn are attached to pulley blocks by steel hooks, the pulley blocks being attached to stakes driven in the ground by means of a rope loop known as a becket. These pulley blocks serve the

(Deposition of Howard Mentz)

purpose of allowing guy lines to be quickly tightened and enable the rigger to keep the rigging level. The connection between the crane bar and guy line cables is made through a clevis which is a U-shaped device with a pin which completely closes the open end of the U. At each end of the trapeze bar are metal stars which add weight to the trapeze.

“Q—Is that a full and complete description of the exact condition of said equipment immediately after it was put in place and before America Olvera Pollinger took her place upon the trapeze?

“A—It is.

“Q—What occurred after she took her place on the trapeze?

“A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then swung the trapeze both sideways and forward; she then got [420] into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her mouth from the trapeze bar and was at the front of her swing when she lost her balance and fell to the ground.

“Q—Did you see America Olvera Pollinger fall?

“A—Yes.

“Q—When did she fall?

“A—Near the end of her act when she was on her knees on the trapeze bar with her hands free just before leaning over to pick up the handkerchief in her mouth from the trapeze bar.

(Deposition of Howard Mentz)

“Q—Describe what you observed in connection therewith.

“A—She lost her balance and fell at the moment when she was at the front of her swing.

“Q—How did she fall?

“A—She fell head first but landed on her side.

“Q—Where did she fall?

“A—Just inside of the ring.

“Q—Was there a net underneath the trapeze?

“A—Yes.

“Q—Describe said net.

“A—A piece of heavy canvas about 10x15 feet with handholds made of rope around the outer edge.

“Q—How many men held on to the same? [421]

“A—Six or eight men.

“Q—State as many of their names as you can.

“A—Joe Horton is the only one whose name I now remember.

“Q—How many in all were there on the net?

“A—Six or eight.

“Q—Where was the net located when Mrs. Pollinger fell?

“A—Directly under the crane bar.

“Q—Did you look at the rigging after she fell?

“A—Yes.

“Q—If so, state what you observed in connection therewith.

“A—Both the trapeze bar and crane bar were the same as when she went up on it, absolutely level.

(Deposition of Howard Mentz)

“Q—State the exact condition, position and location, of every guy rope, cable, hook, eye, cross bar, wire, and portion of said equipment after Mrs. Pollinger fell.

“A—The trapeze bar upon which she stands or sits when she performs her act is a steel bar $\frac{7}{8}$ of an inch thick and about four feet long. It is suspended from a bar known as the crane bar by steel cables $\frac{3}{8}$ or $\frac{1}{2}$ inch thick. These cables are attached to the crane bar by means of metal hooks known as sister hooks or marine hooks, these hooks being in the form of a figure eight. These cables are about $10\frac{1}{2}$ feet long and instead of being attached directly to the trapeze bar are attached to solid steel bars about $\frac{1}{2}$ inch thick and $1\frac{1}{2}$ feet long which in turn are attached to the [422] trapeze bar at right angles making the total distance from the crane bar to the trapeze bar about 12 feet. The crane bar is a metal tube about $1\frac{1}{2}$ inches in diameter and about 5 feet long. It is suspended by means of ropes and pulleys from metal bail rings which are attached to the center poles which hold up the tent. The crane bar is kept steady by means of four quarter inch steel cables known as guy lines which in turn are attached to pulley blocks by steel hooks, the pulley blocks being attached to stakes driven in the ground by means of a rope loop known as a becket. These pulley blocks serve the purpose of allowing guy lines to be quickly tightened and enable the rigger to keep the rigging level. The connection between the crane bar and guy line cables is made through a clevis which is a U-shaped device with a pin which completely closes the open end of the U. At each end of the trapeze bar are metal stars which add weight to the trapeze.

(Deposition of Howard Mentz)

“Q—Did you observe whether or not she was injured?

“A—She was apparently unconscious but I could not observe the extent of her injuries.

“Q—Relate the times when you saw America Olvera Pollinger perform on her trapeze.

“A—Practically every performance during the 1937 season prior to the time of her injury.

“Q—Relate the times when you observed the rigging upon which she performed. [423]

“A—Practically every day except when I was in bed with a broken ankle.

“Q—Do you know whether or not it was rigging supplied by her?

“A—Yes, it was her rigging.

“Q—If so, state.

“A—Yes, it was supplied by her.

“Q—Have you had occasion to observe the use of rigging for other trapeze acts?

“A—Yes.

“Q—State what experience you had in observing and examining equipment or rigging used for trapeze acts.

“A—For about ten years with the Al G. Barnes show and Sells Floto show. In addition to this I have built riggings myself.

“Q—Are you familiar with the marine hooks by which the cable extending from the upper cross bar to the lower cross bar upon which America Olvera Pollinger performed?”

Mr. Marcus: I believe that portion of the transcript, your Honor, where there was a stipulation entered into

(Deposition of Howard Mentz)

between counsel and me, with respect to the answers to questions 61 and 78, which were identically the same as the other questions, when they were answered, were stipulated by counsel and me at the time the deposition was previously read that they were identical, word for word.

Mr. Combs: What are you talking about, counsel?
[424]

Mr. Marcus: You haven't got it in your book.

Mr. Combs: Let me take a look at it in your book.

Mr. Marcus: May it be stipulated they are exactly the same, and are word for word the same as the other interrogatories?

Mr. Combs: Yes.

The Court: What was the number of the interrogatory?

Mr. Marcus: They were Nos. 61 and 78.

The Court: In other words, it would be a repetition?

Mr. Marcus: Yes.

Mr. Combs: All right, your Honor, so stipulated again.

"Q—Are you familiar with the marine hooks by which the cable extending from the upper cross bar to the lower cross bar upon which America Olvera Pollinger performed?

"A—Yes.

"Q—Describe the same.

"A—The hooks are made of steel in the shape of a figure eight completely closed but can be opened like a pair of scissors. There is a pin in the center of the figure

(Deposition of Howard Mentz)

eight which holds the two parts of the figure eight together. They cannot be opened when there is any weight on them.

“Q—Are you familiar with the attachment of guy wires to the upper cross bar?

“A—Yes.

“Q—Describe the same.

“A—Four steel guy lines or cables about $\frac{1}{4}$ inch thick, [425] 25 to 30 feet long, with a spliced eye on each end and which in turn are hooked to the crane bar by a shackle or clevis.

“Q—How long did it take for America Olvera Pollinger to perform her act?

“A—Four and one-half to five minutes.

“Q—In your opinion, would it be possible for one of the upper marine hooks holding the lower cross bar to become tangled or overlapped in a manner which would result in the same being hooked over the top of the eye extending from the upper cross bar downward?

“A—It would be possible but very improbable.

“Q—If it could be so tangled or overlapped, what would be the effect on the lower cross bar?

“A—One end of the lower cross bar would be higher than the other end which would immediately be noticeable to anyone observing the rigging.

“Q—In your opinion, would it be possible for the guy wires attached to the clevis on the upper cross bar to be so arranged that the extension cables reaching from the upper to the lower cross bar would be uneven in length

(Deposition of Howard Mentz,

and the lower cross bar be in other than a true horizontal position?

"A—No. Because the guy lines have no relation to the length of the cables supporting the trapeze bar."

Mr. Combs: No. 96 was sustained; 97 was sustained, wasn't it?

Mr. Marcus: Yes. [426]

Mr. Combs: 98 went out.

"Q—Would it be possible for the force exerted on a cross bar caused by a performer falling from the cross bar or the back lash of the cross bar to tangle or overlap the marine hooks attached to the upper cross bar?

"A—In my opinion it is not possible.

"Q—If the marine hooks were so tangled or overlapped, what would be the effect on the lower cross bar?

"A—One end would be lower or higher than the other.

"Q—Could this effect be observed by those on the ground under the cross bar?

"A—Yes.

"Q—In your opinion would it be possible for the clevis to which the main support and upper guy ropes or wires were attached to the upper cross bar to have become twisted when the rigging was put up in a manner so that the guy wires and main support cables or ropes were not evenly adjusted in the curve of the round end of said clevis and to remain in that position during the entire portion of America Olvera Pollinger's act to and until the time when she rose for her final bow on the cross bar?

"A—In my opinion it would not be possible.

"Q—In your opinion, would it have been possible for America Olvera Pollinger to have performed her entire

(Deposition of Howard Mentz)

act up to the last few seconds with the upper large hook connecting the main bar to the falls in the abnormal position herein- [427] before described, being held in place by the guy wires until America Olvera Pollinger rose for her last bow, and to slip down at that time?

"A—No, it would not."

Mr. Combs: I guess we go now—

Mr. Marcus: To volume 5, page 504, line 20.

Mr. Corkery: What is the interrogatory now?

Mr. Combs: Cross interrogatory No. 1.

(Interrogatories read by Mr. Marcus; answers read by Mr. Corkery.)

"Q—Is it not a fact that your salary was paid by the Al G. Barnes Show?

"A—My salary was paid by the Al G. Barnes Show but in addition Mrs. Pollinger gave me the sum of \$4 or \$5 each week for looking after and taking care of her rigging, as is customary in the show business.

"Q—How much was your salary per month?

"A—Al G. Barnes paid me around \$80.00 a month with my board. I was paid every week and received \$17.50 each week.

"Q—Were you paid in cash or by check?

"A—I was paid in cash.

"Q—Please name the person who paid you your salary.

"A—Theodore Forestal.

"Q—Is it not a fact that you erected the rigging of all of the trapeze performers in the Barnes Show? [428]

(Deposition of Howard Mentz)

"A—I did not personally erect the rigging for all trapeze performers in the Barnes Show but the erection of all rigging of the trapeze performers was done under my personal supervision.

"Q—Is it not a fact that during your entire period of employment you erected the rigging of the trapeze performers in the Barnes Show?

"A—I supervised the erection of the rigging in the Barnes Show during my entire period of employment except for the weeks or so that I was laid up with a broken ankle.

"Q—Is it not a fact that the erection of the rigging was the work for which you were employed by the Barnes Show?

"A—Yes.

"Q—Is it not a fact that on September 12th, 1937, you were suffering from the result of an accident to your foot and that your foot was in a cast?

"A—Yes.

"Q—Is it not a fact that on September 12, 1937, you did not erect the rigging or assist in erecting the rigging on the America Olvera or of any other trapeze or rigging in the show?

"A—I did on this day assist and did supervise erecting the rigging on America Olvera and all of the other trapeze performers in the show.

"Q—For what period of time prior to September 12, 1937, were you unable to erect the rigging or assist in erecting [429] the rigging of the performers in the show?

"A—It was for a period of one week. The best I can remember I had been back supervising the erection on

(Deposition of Howard Mentz)

the rigging for at least four or five days prior to September 12, 1937.

"Q—Is it not a fact that on September 12, 1937, you were not present at the time that Miss Olvera's rigging was set up?

"A—It is not a fact. I was present.

"Q—Is it not a fact that a bone in your foot was fractured prior to September 12, 1937?

"A—Yes.

"Q—Is it not a fact that many employees of the Barnes Show erected the rigging of the different performers prior to September 12, 1937?

"A—The only employees of the show who erected the rigging of the different performers prior to September 12, 1937, were eight men under my supervision who were employed for that purpose.

"Q—Name the different persons who erected the rigging?

"A—Charles Huey, Neville Bailey, Lawrence Lance, Phillip La Bay, Tom Parsons, a fellow named James whose last name I cannot recall, and I can't recall the names of the rest of them.

"Q—Is it not a fact that on September 12, 1937, you first learned of the accident after Miss Olvera was taken to [430] the hospital?

"A—No, I was present when the accident happened.

"Q—Is it not a fact that you first met Karl Pollinger on September 12, 1937, as he was leaving the hospital where Miss Olvera was taken?

"A—I saw Karl Pollinger on September 12, 1937, on the circus lot just before Miss Olvera performed her act.

(Deposition of Howard Mentz)

I did not talk to him at that time. I was sitting in the grandstand seats and I do not know whether he saw me or not.

“Q—Is it not a fact that at said time and place the following conversation took place between yourself and Karl Pollinger? You stated, ‘I am very sorry, Mr. Pollinger, that I was not there during the time that the rigging was erected because if I had been there the rigging would have been put up right and the accident would never have happened.’ Mr. Pollinger stated, ‘You boys do not pay enough attention to putting up the rigging correctly.’

“A—I had no such conversation with Mr. Pollinger and made no such statement to him. I did say to Mr. Pollinger that I was sorry that the accident happened and inquired how Miss Olvera was getting along. Mr. Pollinger never made the statement to me then or at any other time, ‘You boys do not pay enough attention to putting up the rigging correctly.’

“Q—Is it not a fact that you had a conversation with Karl Pollinger in Hollywood on Fairfax Avenue at the time that the show was showing in Hollywood in the year 1938 and [431] you stated to Mr. Pollinger the following: ‘Karl, I want to tell you something. I was called to the front wagon by the show and the big boss said to me, “Tell me what you know about this accident of America.” So I told the boss, “I don’t know anything about the accident, you know at the time I had my foot broken and I wasn’t on the grounds.” So the boss said to me, “You have to remember what happened if you want to keep your job. So go back and think it over.”’ Then Pollinger said, ‘Good for you, Howard, you did the

(Deposition of Howard Mentz)

right thing.' Then you stated, 'Don't worry, Polly, there are many men around here who will tell the truth.'?

"A—I never had such conversation with Karl Pollinger.

"Q—Prior to September 12th, 1937, how many times did you erect the rigging of Miss Olvera during the entire season?

"A—I supervised and helped erect the rigging of Miss Olvera twice a day, and after my ankle was broken there was a period of approximately a week that I was not on the circus lot and did not supervise or help erect the rigging of Miss Olvera. I had been back supervising and helping erect the rigging of Miss Olvera four or five days prior to September 12, 1937.

"Q—Is it not a fact that the rigging was erected twice each day for the two performances that were given during the season of 1937?

"A—Yes. [432]

"Q—Is it not a fact that you were not in the circus tent at the time that Miss Olvera performed on September 12, 1937, nor did you see her fall from the trapeze?

"A—I was in the circus tent sitting in the grandstand seats at the time Miss Olvera performed on Sept. 12, 1937, and did see her lose her balance and fall from the trapeze.

"Q—State what color costume she wore at the time she performed her act on September 12, 1937?

"A—I do not recall the color of the costume she wore on that day as she had different colored costumes which she wore.

(Deposition of Howard Mentz)

"Q—If your answers to your direct interrogatories are 'Yes' to seeing the accident, is it not a fact that you are so stating in order to retain your position with the Ringling Show?

"A—No. I can get other jobs.

"Q—State the names of the persons present after Miss Olvera fell to the ground from the trapeze?

"A—The boys I can remember are Phillip La Bay, Tom Parsons, Joe Horton, Chandler P. Miller, George Blackie Williams, Robert Thornton, Chas. Huey, Lawrence Lance, Karl Pollinger and other property men whose names I cannot recall.

"Q—Is it not a fact that the net was supplied by the Barnes Show?

"A—I am not sure, but I think the nets were supplied by the Barnes Show. [433]

"Q—Is it not a fact that the employees of the Barnes Show held the net?

"A—Yes.

"Q—Is it not a fact that some of the same employees who erected the rigging held the net? Name them.

"A—Just two of the men erecting the rigging held the net, namely, Tom Parsons and Joe Horton.

"Q—Did you hold the net?

"A—No.

(Deposition of Howard Mentz)

“Q—State what happened after Miss Olvera fell?

“A—Her husband with a number of other men rushed to her and her husband picked her up assisted by a few more property men and they rushed her out of the main tent. They came right by me where I was sitting and she appeared to me to be unconscious.

“Q—State if anything was said by her, if so, what?

“A—I heard her say nothing. She seemed to be unconscious.

“Q—Is it not a fact that you stated to Karl Pollinger in Baldwin Park, California, during the early part of the year in 1938 that the Barnes Show paid you \$10.00 to keep Pollinger from Miss Olvera’s apparatus so that the Barnes Show could break open her trunk, take out the apparatus and take pictures of all the parts and that you thereupon stated, ‘Don’t worry, Polly, there is nothing missing, I give you my word of that.’ Karl then stated, ‘Tell me who [434] it was that broke into the box and I will give you ten (\$10.00) dollars.’ And you said, ‘No, wait until the season is over and I’ll tell you the name and plenty of things you don’t even dream about.’

“A—It is not a fact; I never had any such conversation.”

Mr. Combs: That finishes the deposition of Mr. Mentz.

(The Court after admonishing the jury took an adjournment until 2:00 o’clock p. m.) [435]

AFTERNOON SESSION.

2:00 O'CLOCK.

(Stipulated that the jurors were present and in the box.)

Mr. Combs: At this time, your Honor, we will proceed with the reading of the testimony of William Matlock.

The Court: What page is it?

Mr. Corkery: Page 578, your Honor.

(Questions read by Mr. Combs; answers read by Mr. Corkery.)

WILLIAM MATLOCK,

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

"Q—Will you state your name?

"A—William Matlock.

"Direct Examination.

"Q—Where do you reside, Mr. Matlock?

"A—Baldwin Park.

"Q—What is your occupation?

"A—I am now half owner of a small circus at Baldwin Park.

"Q—At Baldwin Park?

"A—Yes, sir.

"Q—What is the name of that circus?

"A—Metrella Brothers.

"Q—Are you employed by Barnes Amusement Company at the [436] present time?

"A—No, sir, not at present.

(Deposition of William Matlock)

“Q—Are you employed by Ringling Bros. Barnum & Bailey at the present time?

“A—No, sir.

“Q—Were you ever employed by either of those corporations?

“A—Yes, sir.

“Q—And by which one?

“A—By the Al G. Barnes.

“Q—Were you ever employed by Ringling Brothers?

“A—I was, yes.

“Q—When?

“A—That was the closing of the season in 1938.

“Q—In 1938, the close of the season?

“A—Yes, when they combined from Al G. Barnes to Ringling.

“Q—When they combined from Al G. Barnes at the close of the season in 1938?

“A—No, in the middle of the season we combined, in Northern California.

“Q—What was done on the combination, as far as you know?

“A—As far as I know, nothing was done on the combination except a change of managers.

“Q—you say ‘combined.’ On what do you base your statement that they were combined at that time?

“A—I think the Ringling show had a strike in Scranton, Pennsylvania, and they closed the show up. [437]

“Q—They closed the show?

“A—And they brought part of their equipment over to the Barnes show.

(Deposition of William Matlock)

"Q—That was what you meant by the combination you referred to?

"A—Yes, sir.

"Q—And that is all you know about the combination?

"A—That is all I know about the combination.

"Q—The fact is that some Ringling stuff was brought from Pennsylvania to the Barnes show?

"A—That is right.

"Q—Do you know what that stuff was?

"A—I couldn't say all of it, no. Part of the paraphernalia and part of the Barnes show; they mixed it together.

"Q—Then you don't know whether they actually combined or not?

"A—No. As we say, 'combined.'

"Q—But that combination was merely just what you have stated here was done?

"A—Yes, that is right.

"Q—How long were you employed by the Al G. Barnes?

"A—Since the opening of the season in 1927.

"Q—Since 1927?

"A—Yes.

"Q—Until what time?

"A—Up until the date that we combined, that is, had the [438] show to go in the northern part of the State. I don't recall the date exactly.

"Q—In the fall of 1938?

"A—Yes, sir.

(Deposition of William Matlock)

“Q—In what capacity were you employed by the Al G. Barnes Circus during that period of time you state you were employed by them?

“A—From 1927 up until 1932—

“Q—What kind of work did you do?

“A—I was a performer up until 1932.

“Q—Then what did you do?

“A—Then I was transferred on the front door, ticket taker, up until 1935.

“Q—Then what?

“A—Then I had the exchange desk on the front door; that is, the exchange of stubs of passes to the reserved seats on the inside.

“Q—And was it in that capacity that you were employed by the Barnes Company at the time Miss Olvera fell on the 12th of September, 1937?

“A—What is that?

“Q—I will withdraw the question. What capacity were you employed in at the time of the fall?

“A—In the same capacity, exchange desk on the front door.

“Q—Who paid your salary?

“A—Al G. Barnes Circus. [439]

“Q—Do you know Theodore Forstall?

“A—Very well, yes, sir.

“Q—What was his capacity?

“A—He was treasurer of the show.

“Q—Of what show?

“A—Of the Al G. Barnes Circus.

(Deposition of William Matlock)

"Q—On the day of September 12, 1937, did you observe America Olvera Pollinger?

"A—I did.

"Q—Before that how long had you known her?

"A—At the opening of the season of that year.

"Q—Did you know Karl Pollinger, her husband?

"A—Yes, sir, at the same time.

"Q—Then you met him at the same time?

"A—Yes, sir.

"Q—Where were you at the time of about 3:30 p. m. on the day of the 12th of September, 1937?

"A—I was sitting in the reserved seats, in between Sections D and E, in the second seat in the third row.

"Q—Describe to the jury just approximately where that was with relation to Miss Olvera's act.

"A—The sections run from A to H in the grandstand on the front side. The D and E aisle is practically in the center of the center ring, and I was sitting on the E side, because the D side was a pass side from the front door, that we issued. The E side was 'Sold tickets,' cash tickets, and [440] the E side is reserved.

"Q—Describe your occasion for being there at that time.

"A—We have ushers on the show that usher the people in, and we watch these stubs—we give them two or three seats for the seats in the front—and as they come into the gate sometimes the ushers misplace these people, because they know they are pass tickets, and they sell the tickets to some one else.

(Deposition of William Matlock)

"Q—You were 'spotting' them in that capacity, were you?

"A—I was sent there by Mr. Karsh, yes.

"Q—Did you observe Miss Olvera perform her act at that time?

"A—I sat there at the time, yes, sir.

"Q—That she was performing?

"A—Yes, sir.

"Q—How far, in number of feet, as best you can give it, were you from the point where she was actually performing?

"A—About—I would say about 35 or 40 feet.

"Q—35 or 40 feet?

"A—Yes, from the end of the ring.

"Q—Was she facing the part of the stand you were in?

"A—I was facing her, yes.

"Q—Facing her act there?

"A—Yes.

"Q—Will you relate to the jury exactly what you observed on that occasion at that time and place in connection with [441] Miss Olvera? Just relate it in your own words to the jury."

Mr. Marcus: Just a minute. That was stricken.

The Court: Read the question and objection.

Mr. Combs: That is correct. I asked the question again in a few lines further:

"Q—Just relate what you saw her do and what did you hear her say, if anything, on that occasion?

"A—I never heard her say a thing.

(Deposition of William Matlock)

“Q—All right, relate what you saw her do and what you saw happen to her, if anything.

“A—Do you mean when she fell? She fell to the ground.

“Q—Well, start from the time she fell, and relate what happened until after she fell.

“A—All right.

“Q—Go ahead, all that you remember.

“A—I walked into the second seat and sat down into the second seat. I was watching an usher and expecting him to move these people, and then Miss Olvera started her act, and when she did I naturally sat there and watched the act, because I was interested in it, and she was doing her work all the way through her act as usual.

“Q—Did you observe anything unusual about the trapeze apparatus at the time?

“A—Positively no.

“Q—Did you look at the trapeze apparatus?

“A—I always did. [442]

“Q—What was the occasion for your always looking at the trapeze apparatus when you see performers?

“A—Because I have put up and taken down rigging for 32 years.

“Q—And you do it from force of habit, do you?

“A—Naturally.

“Q—Did she fall on that occasion?

“A—Yes.

“Q—Just state what you observed. Did you observe her on her knees, picking up the handkerchief?

“A—Yes; I observed her picking up the handkerchief from her knees on the bar. Yes; she got the handkerchief up.

(Deposition of William Matlock)

"Q—And then what occurred?

"A—She started to make a style at the audience.

"Q—You saw that?

"A—That was a one-arm style.

"Q—By 'style' what do you mean; a bow or a curtsy or something?

"A—Well, a curtsy bow with her hands; yes.

"Q—What occurred to her then when she did that?

"A—At the end of the swing it caught her just over-balanced and fell forward.

"Q—She fell forwards?

"A—Yes; she fell forwards.

"Q—Where did she fall?

"A—Just missed the ring curb. [443]

"Q—Just missed the ring curb?

"A—Yes.

"Q—Was there a net below her at that time?

"A—The net was not below her. It was below the bar, naturally.

"Q—It was centered under the trapeze?

"A—Centered under the trapeze; yes.

"Q—How many carried the net?

"A—There was 8 men, as I recall, 8 men.

"Q—Now relate what you did later on, or from that point on.

"A—After the fall I got up out of the seat, which I have to walk around from the front side to the back side as we can't cut across—"

(Deposition of William Matlock)

Mr. Marcus: Just a minute. I believe that entire answer went out.

Mr. Combs: Oh, yes; it did. I am sorry. We stipulate that what has been read may be stricken at this point.

The Court: It is so ordered.

“Q—Just relate now what you observed America Olvera Pollinger do during the time you remained in your seat.

“A—Well, she did two swinging tricks and standing—I think there was two, and I can’t recall all the tricks because I am not in the tent all the time.

“Q—Relate, however, what she did immediately after she fell, what occurred at that time. [444]

“A—Well, immediately after she fell she lay there and they had to pick her up and take her out.

“Q—Who picked her up and took her out?

“A—I don’t recall who it was taken her out of there, because I was more interested in the rigging. I got up and left immediately after.

“Q—Just after she fell you left?

“A—Yes.

“Q—Before leaving did you have occasion to look at her rigging?

“A—Yes; I noticed her rigging because I didn’t know whether anything broke or how come the fall.

“Q—What did you observe in that connection?

“A—Well, I just observed the rigging as usual.

“Q—The same condition as it was before she started her act?

“A—Yes, sir.

(Deposition of William Matlock)

"Cross Examination.

(Questions read by Mr. Marcus; answers read by Mr. Corkery):

"Q—Mr. Matlock, you are acquainted with Mr. La Bay, are you not?

"A—Why, yes, sir.

"Q—How long have you known him?

"A—I have known Mr. La Bay practically two years.

"Q—Prior to the date that this accident happened?
[445]

"A—No, no. One year prior to the date.

"Q—You saw him in court, or have you seen him here in court?

"A—No, sir.

"Q—He is living at Baldwin Park, is he not, at the present time?

"A—I don't know. I do not know.

"Q—Have you seen him there at Baldwin Park?

"A—Yes. He came into Baldwin Park I think it was last Saturday, at my place.

"Q—Last Saturday?

"A—Yes.

"Q—And how often have you—

"A—Friday or Saturday. I am not positive.

"Q—How often have you seen him during the past two years?

"A—I have seen him once with a little circus I had on the road this summer. He visited and come on the show that afternoon, put on a uniform and left that night.

(Deposition of William Matlock)

"Q—You are acquainted with his appearance and you could recognize him if you saw him, could you not?

"A—Yes, sir.

"Q—Did he hold the net that day?

"A—Did he hold it?

"Q—Yes, sir.

"A—I can't recall that. [446]

"Q—You didn't see him hold it, did you?

"A—I couldn't say that, because I don't pay any attention to what men holds the net when you are looking at the act.

"Q—You looked at the net, didn't you?

"A—I observed the net on the ground before the act started, but not after that.

"Q—You observed it on the ground before the act started?

"A—Yes, sir; naturally.

"Q—Did you ever observe the net being lifted up or held by anybody?

"A—Yes.

"Q—Who was it held the net, to your best memory?

"A—To my best memory, was the rigging men on the show.

"Q—Who were they, sir?

"A—Well, to call them by name, I couldn't call the boys by name because I wasn't in the props yet.

"Q—How many men were holding the net?

"A—About 8; just about 8.

"Q—Can you give us the name of one man?

"A—No, I don't think I can, not one man.

(Deposition of William Matlock)

“Q—Were you watching all the apparatus?

“A—I was not—you can’t watch it all at one time, top and bottom.

“Q—Well, did you see all the apparatus that day?
[447]

“A—Yes, sir; I am positive I did. Yes, sir; I saw the apparatus.

“Q—Did you see the top bar?

“A—I did.

“Q—You looked up there to see that?

“A—And also the trap bar.

“Q—The trap bar, you mean the trapeze bar?

“A—That is it.

“Q—The lower bar?

“A—Yes, sir.

“Q—Can you tell us approximately how many feet from the trap bar to the top bar?

“A—About 12 feet, 11 or 12 feet.

“Q—Was the top of the tent curved?

“A—The top of the tent curved?

“Q—Yes.

“A—If it was, this slope—

“Q—Well, was it curved in any way?

“A—The top of the tent may be curved about approximately a few inches, but not enough that that rigging would make any difference, because it doesn’t go as high as the flying rigging.

“Q—No. I am just asking you if you observed the top of the tent curved or not.

“A—No; I didn’t.

(Deposition of William Matlock)

“Q—You didn’t notice that? [448]

“A—No; because I was watching the blocks to the bail rings.

“Q—You were watching the blocks to the bail ring?

“A—I was not watching them, but I looked at them.

“Q—What was the occasion of your watching the blocks to the bail rings?

“A—Because I have been putting up rigging in the Al G. Barnes Circus, and 8 years I am in the paraphernalia.

“Q—Did you go in there to watch it that day?

“A—No. I went in there to see that an usher did not misplace some people I sent in on complimentary tickets.

“Q—You were watching for these people too, weren’t you?

“A—Not when the act started, because it was all over.

“Q—You looked up there and did you observe those blocks during the entire act?

“A—When an act is working, that is the first thing I look at.

“Q—I say, did you observe these blocks during the entire act?

“A—No; as I say, I was watching the lady part of the time.

“Q—Did you observe the bar when you looked up there?

“A—I observed the bar and trap part together.

“Q—Could you tell whether the trap bar was level or not?

(Deposition of William Matlock)

“A—Yes; because when you get a rigging out and your top bar is level, your bottom bar has to be level with it, [449] otherwise there is something wrong with your rig.

“Q—Could not the top bar be a bit out of line and be held up there by the clevises?

“A—If it is, it should be noticed and it would have been noticed, and I noticed it was not lower because that much difference of two inches would be noticed from the level of your bottom bar and level of your top bar.

“Q—Could not the top bar be level and the bottom bar be out of line if one of the lines is crossed over the sister hook? Would it be possible for the upper bar to be level and the bottom bar would be out of line, if one line was crossed over the sister hook?

“A—That might be; yes, sir.

“Q—It could be?

“A—It could be; yes, sir. But it would be—

“Q—It could be?

“A—Yes, sir. But it would be—

“Q—But the top bar—

“A—But it would be noticeable from anyone that ever put up a rigging in the world.

“Q—In case they were looking up at it?

“A—If you put it up you would look at it.

“Q—If it was out of line two inches on top of this 40-foot or 35-foot tent you could see it?

“A—The rigging isn't that high.

“Q—How high is the rigging? [450]

“A—I imagine the top of the crane bar would be about three, three or four feet.

(Deposition of William Matlock)

"Q—Can you tell in three or four feet at the top of the tent if it was out of line two inches, if you were sitting over in the seats?

"A—If I was in front of it; yes, sir.

"Q—And you looked for that, did you?

"A—Positively; yes, sir.

"Q—How often did you see America Olvera perform her act prior to this occasion that she fell, if any?

"A—I think, at the opening of the season in San Diego is the only time that I saw her besides that, because I am employed in the front door all the time.

"Q—You say you think you saw her in San Diego?

"A—I saw her in San Diego.

"Q—You are sure now that you saw her?

"A—I am not positive, but I saw her one time before that, and where it was I couldn't tell you.

"Q—Do you remember all of the details of her act, sir, at this time?

"A—Not all of the details; no, sir.

"Q—Do you remember all of the tricks to her act at this time, seeing it once?

"A—No, no.

"Q—You do not?

"A—No, sir. [451]

"Q—Can you describe the act to us now?

"A—I can describe just one or two parts that she does, which I noticed plainly.

(Deposition of William Matlock)

“Q—Then, you don’t know whether she had completed her act or not when she fell, do you?

“A—She was right at the completion of her act because all acts complete their act with handkerchief tricks—most all of them I can recall.

“Q—And is that what you base the fact upon when you testified that she had completed her act?

“A—No, sir; but it was the end of the completion of the act, because the time of the act was four minutes or five minutes or whatever it would be, and that would naturally be, but I know it would be the completion of the act, professionally speaking.

“Q—You are basing that upon what you believe, is that right, not what you knew?

“A—I saw the act once before or maybe twice. I am not positive of it, but I saw the act before, but where.

“Q—You say that she was standing up to take a curtsey or a bow?

“A—No; she was on her knees.

“Q—She was on her knees?

“A—Yes, sir.

“Q—And had not stood up?

“A—She had stood up before that; yes, sir. [452]

“Q—When she got her handkerchief off the bar, what did she do?

“A—She fell forward on her style.

“Q—She fell forward, face first?

“A—Yes; that is right.

(Deposition of William Matlock)

"Q—She did not fall backwards?

"A—No, sir; she fell forwards at the end of the swing, just practically, I would call it, at the end of the swing, because it was too far for the net to be under. At the end of the swing the net was too small accordingly.

"Q—The net was too small?

"A—Yes, sir.

"Q—Did you see that?

"A—Well, it naturally would. The net, I don't presume, is over 8 or 9 feet in width.

"Q—And you say you bought that equipment, do you?

"A—Not that equipment; no, sir.

"Q—By the way, whose net was that?

"A—I don't know.

"Q—Was that furnished by Miss America?

"A—I don't know. I couldn't tell you.

"Q—You say that she was standing on her knees on that bar?

"A—She was on her knees; yes.

"Q—Was that when she fell, when she was on her knees?

"A—At the finish of that trick, picking the handkerchief [453] up.

"Q—How did she pick the handkerchief up?

"A—With her mouth.

"Q—Was she holding her hands on the line at the time?

"A—No, sir.

"Q—She was not trying to get hold of the line?

"A—No, sir, not during her trick.

(Deposition of William Matlock)

"Q—At the end of the trick did you see her attempt to reach for the line and miss it?

"A—No; I didn't.

"Q—Did you see her attempt to stand up from a kneeling position on the bar?

"A—No; because the fall was too sudden.

"Q—You mean you did not see her, or she did not?

"A—I saw her fall forward, directly forward on her style. I didn't see her reach for nothing.

"Q—And you didn't see her attempt to stand up on the bar?

"A—No; not in falling.

"Q—Did she ever at any time stand up in the last trick before she fell?

"A—I don't recall it.

"Q—Did the net move at any time from the position it was in at the beginning of the act?

"A—Well, I don't know that.

"Q—You say that these shows combined? [454]

"A—I didn't say they combined. They came together and they changed their staff. The staff was changed from the Ringling to the Barnes show—from the Barnes show to the Ringling, and I was one of the staff and left the show in Wawaso, Wisconsin.

"Q—You say there was a strike in Philadelphia, Pennsylvania, or some place?

"A—Scranton.

"Q—Scranton. And the Ringling Brothers closed up?

"A—That is right.

(Deposition of William Matlock)

"Q—What did they do with their equipment?

"A—Part of the equipment came over to our show, the Barnes show.

"Q—They took Pat Valdo along with that equipment?

"A—Yes, sir.

"Q—Mr. Gumpertz?

"A—With Mr. Gumpertz; yes, sir.

"Q—Then who took charge from that time on?

"A—Mr. George Smith.

"Q—Was Mr. Valdo connected with it?

"A—Mr. Valdo was the assistant director; yes.

"Q—What was Mr. Gumpertz' connection with it?

"A—Mr. Gumpertz was not connected with the show.

"Q—He had not come over to the Ringling at all?

"A—Not to my recollection.

"Q—Did you get all the equipment of the Ringling show? [455]

"A—No.

"Q—Mr. Matlock, what did you observe first on that date in connection with Miss America's act?

"A—The first thing I observed?

"Q—Yes. What did you see first when you sat down in your seat?

"A—Well, naturally, when I sit down in a seat, Miss Olvera, she was just going into her act.

"Q—Exactly what was she doing at the time?

"A—She was doing a standing trick.

"Q—She was already on the bar?

"A—Yes; she was already on the bar when I came into the seats and sat down.

(Deposition of William Matlock)

"Q—She was standing on the bar?

"A—Yes, sir.

"Q—You don't know what had happened previous to that?

"A—No, sir; because I was coming down the hippodrome.

"Q—Did you observe everything that happened in connection with her after that?

"A—No; not everything. I couldn't observe everything.

"Q—You saw two other acts on at the same time, didn't you?

"A—Yes; two trapeze acts on at the same time.

"Q—Did you observe those two during that period of time?

"A—No; not so much as I did her. You would naturally turn your head a little bit, and I couldn't recall what I saw [456] of the other acts; that is, I didn't pay any attention to them.

"Q—How long were you sitting there?

"A—I was sitting there about—I would say about three or four minutes all together.

"Q—Was the act going on during all that period of time?

"A—No; because after the fall, after the fall I got up then after that, a little bit after, and went around to the back side of the tent.

"Q—And were the other acts continuing on at that time?

"A—No; they had finished.

(Deposition of William Matlock)

"Q—They had finished?

"A—They had finished ahead of time; yes, sir.

"Q—They finished ahead of time?

"A—A little bit ahead of time; yes, sir.

Mr. Combs: We will read the testimony of George Williamsson. Page 516. This is the deposition of George Williamson; interrogatories to be administered to George Williamson.

(Interrogatories read by Mr. Combs; answers read by Mr. Corkery):

The Court: Is there any of the preliminary part you might eliminate there?

Mr. Combs: Yes, let us start with question 9. The other is just the qualification for the taking of the deposition. [457]

"Q—What is your occupation?

"A—Superintendent of properties.

"Q—How long have you been engaged in that occupation?

"A—For about thirty-five years.

"Q—State with whom you have been employed as a rigger.

"A—Barnum & Bailey, London Hippodrome, Hagenbeck-Wallace, Sells-Floto, Al G. Barnes and Ringling Bros.

"Q—State the periods of time you have been so employed and for whom employed during said periods of time.

"A—From 1904 to 1912 with Barnum & Bailey; from 1912 to 1918, superintendent of the Hagenbeck-Wallace

(Deposition of William Matlock)

show; then I was transferred to Sells-Floto show in 1924 and stayed with that show until 1932, and from there to the Al G. Barnes show—I was transferred to the Al G. Barnes show.

“Q—Explain what you did as rigger for the Al G. Barnes-Sells-Floto Combined Circus.

“A—I was general superintendent of properties and superintended putting the riggings up. The performers always looked over the riggings and inspected them themselves before they went up to perform.

“Q—Is that the circus operated during the year 1937 by the Al G. Barnes Amusement Company?

“A—Yes.

“Q—Did you work for them as a rigger?

“A—No, I was boss property man and superintended putting up the riggings. [458]

“Q—For what period of time?

“A—For the four seasons: 1935, 1936, 1937 and 1938; also I have had thirty years' experience with other big circuses throughout the world, including Mexico, South America and Europe.

“Q—Do you work as a rigger now?

“A—Now, I am general superintendent of the property department of circuses.

“Q—What did you do for the Al G. Barnes Amusement Co. when you worked for them as a rigger?

“A—I never worked for them as a rigger. I was with them as general superintendent of properties, what is called boss prop man; I had complete charge of all the men, including their hiring and firing.

(Deposition of William Matlock)

"Q—What did you do for anyone else as a rigger?

"A—About twenty-five years ago I worked as a rigger but since that time I have been superintendent of rigging and boss prop man continuously. I never missed a season and never had an accident.

"Q—Did you work for the Al G. Barnes Amusement Co. on September 12, 1937, as a rigger?

"A—No, I worked for them on that date as a superintendent of properties and as boss prop man.

"Q—Did you know America Olvera Pollinger, the plaintiff in this action?

"A—Yes, very well. She is of Mexican nationality and [459] I can speak several languages, including Spanish and we had many conversations together, sometimes in Spanish. She always praised my work and gave me gratuities and several times remarked that my work was perfect and that she could rely on anything I did or supervised. She always complimented me and never at any time made any complaint.

"Q—When did you first meet her?

"A—In the spring of 1937.

"Q—Did you ever act as a rigger for her?

"A—No, I was superintendent of properties and boss prop man and supervised the rigging but did not do the rigging myself. I examined the rigging and it was my business to see that the rigging was perfect before Miss America Olvera Pollinger or any other performer did their act. If the riggings were not perfect, I wouldn't let them go on, that is, I would go to the equestrian director and tell him and he would not let them go on and would substitute another act in their place.

(Deposition of William Matlock)

"Q—Did you ever act as a rigger on any equipment used by America Olvera Pollinger?

"A—No, as I said before, I was superintendent of properties and general property man; I supervised and inspected every wire and every cable with the show and examined the ropes and inspected all the equipment used by America Olvera Pollinger and the rest of the performers and on September 12, 1937, and on every other day, I found the [460] rigging and equipment used by America Olvera Pollinger perfect and in A-1 shape before she performed.

"Q—State at what time you acted as a rigger for America Olvera Pollinger.

"A—As I said before, I never acted as rigger but I was superintendent of properties and boss prop man and supervised the rigging before she went up and I also watched the rigging while she was working. Her act was one of the feature acts in the center ring and I always remained right at the feature act to watch every little thing connected with it.

"Q—State what time you acted as a rigger on any equipment used by America Olvera Pollinger.

"A—I believe I have sufficiently answered this question before when I say that I never acted as a rigger but was boss property man and superintendent of props.

"Q—What were you doing on the date of September 12, 1937?

"A—The same thing—superintendent of properties, boss property man.

(Deposition of William Matlock)

"Q—Did you act as a rigger for America Olvera Pollinger on that day?

"A—No, but I was boss property man and superintendent of props and was present during the entire performance on that date and supervised, inspected and examined everything connected with the act of America Olvera Pollinger. Her act [461] was the feature act and it required special attention from me.

"Q—Was the rigging used by America Olvera Pollinger on September 12, 1937, the same rigging used by her during the entire show season of 1937, previous and up to September 12, 1937?

"A—Yes.

"Q—Did you do anything in the erection of the America Olvera Pollinger equipment or rigging on that day?

"A—I supervised the erection of all equipment and rigging for the Al G. Barnes Circus and had the rigging man guide it out perfect and I, myself, leveled it off and supervised the leveling off myself. After I gave it my O.K. and found it perfect, then Carl Pollinger, the husband of America Olvera Pollinger, inspected it and told me that everything was O.K. and perfect and told us to go ahead with the act. America Olvera Pollinger always looked over all the equipment and everything after we got through and would give us the O.K. to go ahead. It was her instruction to me that her husband would O.K. everything before her act went on, and on September 12, 1937, and every other time the act went on, I followed her directions on that and on this date, September 12, 1937. I found everything in perfect condition—in good order, and then her husband inspected it and he found every-

(Deposition of William Matlock)

thing in perfect condition and he said everything is O.K.
[462]

“Q—Did you observe America Olvera Pollinger perform her act on the 12th of September, 1937?

“A—Yes.

“Q—Did you know Carl Pollinger?

“A—Yes.

“Q—When did you first meet him?

“A—In the spring of 1937.

“Q—In what connection?

“A—He was a performer in the Al G. Barnes show and he also directed his wife's rigging and waited on her every day when she went on. He would see that the guy lines were not crossed, that everything was perfect and everything level before she went on to do her act. I would say that he was sort of a director for his wife and looked after her act and interests and she always waited for his O.K. and he O.K.'d everything on the day that she fell.

“Q—Was he present at Anthony, Kansas, on September 12, 1937?

“A—Yes, he was.

“Q—Do you know what he was doing at that time?

“A—Yes, he had another feature act in the show and during his wife's act, he waited on her and attended her and held the web, which is the rope she climbs up on and comes down on. He stood there in the center of the ring and took her cloak off of her and directed me where to hold the net and told my crew where to hold the net. [463]

(Deposition of William Matlock)

"Q—Did he participate in or help you in putting up America Olvera Pollinger's rigging on September 12, 1937?

"A—He did not participate in putting up the rigging on that day, but he inspected and examined the rigging like he always did every day, and told me that everything was perfect and O.K.

"Q—What did he do in that connection?

"A—He examined and inspected the rigging and everything, and saw that everything was level, and he said: 'Everything is O.K.—go ahead with the act.'

"Q—Did he help America Olvera Pollinger perform her act that day?

"A—He waited and attended on her like he always did during every other day during the season, and he held the web and directed my crew how to hold the net, and where to hold the net, and I told my crew it was O.K. for them to hold the net according to his orders.

"Q—What did he do in that connection?

"A—He helped her in her act, and held the web by which she went up and he swung her and stopped by the web while she was in the trapeze.

"Q—Did you see America Olvera Pollinger on said date at or about the hour of—?

"Mr. Combs: Which we have established as 3:30 p. m. on that day, I believe.

"A—Yes, during the afternoon performance around 3 p. m. [464]

"Q—What was she doing?

"A—She was getting ready for her act and talking to me. She said that she was going to do a good act because

(Deposition of William Matlock)

some of the officials of Ringling Bros. was there sitting in the seats in front of her rigging. She asked me to point out Pat Valdo and show her where he was sitting. Pat Valdo is one of the big men from the Ringling show, and he has charge of hiring all the artists. She looked very nervous to me.

“Q—What occurred?

“A—She got up there and done her full act until nearly to the finish, and she fell from the last trick that she done. Her husband pulled her up to the trapeze, assisted by a rigging man. She was wearing a Spanish costume, and she swung the trapeze rope sideways and forward, balancing herself. She got into a high swing in which she was helped by her husband who was on the ground, holding the rope and directing the men underneath who were holding the net. As the swing slowed up, she knelt on the trapeze bar with her knees, with her hands free. She fell from the bar of the trapeze while she was making a bow to the audience with her right hand extended to the audience. All of a sudden she lost her balance and fell to the ground. Usually when she bowed, she grabbed the side of the trapeze with her left hand, and bowed with her right hand extended to the audience, but when she fell she had both hands free.

“Q—Relate in detail exactly what transpired with [465] relation to America Olvera Pollinger’s act on the trapeze.

“A—Her husband held the rope and with a rigging man pulled her up to the trapeze, where she was about to perform. She performed, doing her usual routine and tricks on a bar, and then she swung the trapeze both sideways and forward. While she was high in the air, and in a high swing, her husband on the ground assisted

(Deposition of William Matlock)

her by holding the rope, and he also told the rigging men where to hold the net, and how to follow her up. I told the rigging men to follow his orders because Miss America Olvera Pollinger told me to do as her husband said regarding the net. When the swing slowed up she knelt on the trapeze bar with her hands free and as she was at the front of the swing, she lost her balance and fell to the ground. She fell as the swing was out towards the audience. At the time she fell, she was swinging more farther than usual, and when she fell she fell beyond the net. Her husband was on the side where she swung, and she fell right in front of him, less than a few feet from the end of the net. She was unconscious after she hit the ground and said nothing. She was carried out to the doctor's tent and hurried away to the hospital. All of this happened in my presence.

"Q—State where you stood.

"A—I was standing near the center pole, near the ring, watching my crew and watching the act.

"Q—State exactly and in complete detail, everything you saw. [466]

"A—I saw her come out of the connection where the performers stand in the center, and get ready for their act. This connection is near the center of the tent. She was standing in the center, near the bandstand, waiting for her time to go on. When I looked at her she was very nervous, and looked like a person who is on pins and needles. The first thing she said to me was: 'Where's Pat Valdo sitting?' I pointed out Pat Valdo sitting in the center section of the grandstand. She walked over to the center of the center ring and her husband nodded to her that everything was O.K. She did her usual

(Deposition of William Matlock)

balancing and routine tricks on the bar, and as I explained before, she fell just towards the finish. I have already explained in detail what happened.

“Q—Who else was there?

“A—The man that directs the show stood right near me at the time, a few feet away, and a number of other people.

“Q—Give their names.

“A—Joe Horton, Thomas Parsons, Carl Pollinger, Phillip La Bay, Chandler Miller, Robert Thornton. Pat Valdo was in the audience, and Mr. Sylvester Cronin. There were others present, but I don't remember their names.

“Q—When America Olvera Pollinger fell, what occurred?

“A—I ran towards her and helped pick her up. She was unconscious and said nothing. I directed a few property men to pick her up and rush right to the doctor's tent, and they followed my directions. [467]

“Q—Was anything said by America Olvera Pollinger at that time?

“A—No, absolutely nothing; she appeared to be unconscious.

“Q—If so, state who was present.”

Mr. Combs: I guess if agreeable with counsel we can skip to 54.

Mr. Marcus: All right.

“Q—Now you may relate exactly what was said by you and what was said by America Olvera Pollinger, and

(Deposition of William Matlock)

what was said by Carl Pollinger and any other persons there in the presence of America Olvera Pollinger.

"A—I directed several property men to rush her to the doctor's tent. No one said anything, and everybody was busy trying to get her to the doctor as soon as possible.

"Q—State the names of the individuals in so far as you can remember them, who helped in the erection of America Olvera Pollinger's rigging on September 12, 1937.

"A—My rigging crew, Phillips La Bay, Thomas Parsons, and Joe Horton, and others whose names I do not remember.

"Q—Do you know whether or not the America Olvera Pollinger rigging was inspected after erected on September 12, 1937, prior to her going on in her act?

"A—Yes.

"Q—Who inspected it?

"A—I inspected it, and then she and her husband [468] inspected it, and she looked it over to see if the bar was level.

"Q—What was done in that connection?

"A—She signaled to me to level off her rigging, and then when I did so, she said: 'Everything is O. K.'

"Q—Can you state what the condition of the rigging was at that time?

"A—It was perfect and leveled in fine shape.

"Q—Relate exactly how it looked when it was in the air.

"A—It was level and in perfect condition, as it had been in the past.

(Deposition of William Matlock)

“Q—Describe in detail the position of each guy rope, hook, eye, clevis, cable, wire, cross bar, or other portion of the equipment.

“A—The trapeze is a bar of solid steel with two stars on the end of it to weight it down. The bar is $\frac{7}{8}$ of an inch thick. The cables are hooked onto each corner of the crane bar in order to guy it out to the ground; there are four cables $\frac{3}{8}$ of an inch thick and each cable is 30 feet long. The top of the crane bar has five rings, two to hook up the trapeze and two to raise it off the ground and one ring to pull the girl up to the trapeze. The trapeze hooks into two sister hooks or marine hooks. The marine hooks or sister hooks are in the form of a figure eight and once you shut them, the weight of the trapeze keeps it locked. This crane bar has four eyes, two eyes hook to the right and two [469] eyes hook to the left of the main falls. The fall consists of a rope—a double block and single block: the fall is from 45 to 50 feet long and it can be raised up and down; the rope that goes into the block is $\frac{3}{4}$ of an inch thick. There are two falls which hook onto the bail rings and the rigging. The upper block hooks to the bail ring and the lower block hooks onto the crane bar. The bail rings are made out of steel and are $1\frac{1}{2}$ inch in diameter, two hooks hook on the bail ring which consists of blocks and falls, which as I said before, consists of a double block and a single block. The cables which hold the trapeze up to the crane bar are 12 feet long and each cable has a sister hook which is connected to the crane bar. The crane bar is $5\frac{1}{2}$ feet long with U-shaped rings commonly called a clevis which are connected right into the crane bar and there is a foot loop to pull the artist up to the rigging. The two main falls hook into the bail ring.

(Deposition of William Matlock)

one to the right and one to the left side of the center pole that holds the rigging up. There are four stakes one on each corner. There is a $\frac{1}{2}$ inch becket with an eye spliced in the rope and the blocks are hooked right into it. The blocks keep the rigging level and guy it out very quickly.

"Q—Is that a full and complete description of the exact condition of said equipment immediately after it was put in place and before America Olvera Pollinger took her place upon the trapeze? [470]

"A—Yes.

"Q—What occurred after she took her place on the trapeze?

"A—She performed her act and as she was making her bow she fell from the trapeze.

"Q—Relate in detail.

"A—She was doing her routine of tricks nearly to the finish of her act and she was balancing with her hands free when she fell. Her husband was holding the rope and was watching her act.

"Q—Did you see America Olvera Pollinger fall?

"A—Yes.

"Q—When did she fall?

"A—Towards the finish of her act while she was making a bow she fell.

"Q—Describe what you observed in connection therewith.

"A—She was doing her act and at the finish and as she was bowing to the audience with her right hand extended to the audience she fell.

"Q—How did she fall?

"A—She fell head first.

(Deposition of William Matlock)

“Q—Where did she fall?

“A—Inside of the center ring near the edge.

“Q—Was there a net underneath the trapeze?

“A—Yes.

“Q—Describe said net. [471]

“A—It is made out of canvas with rope handles to hold it tight so the men can hold it firmly.

“Q—How many men held on to the same?

“A—About ten men.

“Q—State as many of their names as you can.

“A—Thomas Parsons, Joe Horton, Phillip La Bay and a man named Whitey and I don't remember the names of the other men who held the net.

“Q—How many in all were there on the net?

“A—About ten men.

“Q—Where was the net located when Mrs. Pollinger fell?

“A—Right underneath her and directly under the crane bar. She hit the edge of the net when she fell and that broke her fall.

“Q—Did you look at the rigging after she fell?

“A—Yes, and everything was O.K.—sister hooks and all that.

“Q—If so, state what you observed in connection therewith.

“A—The trapeze bar and the crane bar were in the same condition as when she went up on it; it was absolutely level and everything was perfect, the same as it always was.

(Deposition of William Matlock)

"Q—State the exact condition, position and location, of every guy rope, cable, hook, eye, cross bar, wire, and portion of said equipment after Mrs. Pollinger fell.

"A—The guy lines were all guyed out right and the [472] rigging was level and perfect and while she was working, it did not give at all and the rigging was firm all the time during her act. I already explained this in detail in answer to question No. 61 and there was no change after she fell. The minute she fell, Mr. Cronin, the manager of the circus, came running out of the seats and took a look at the rigging."

Mr. Marcus: That part with regard to what Mr. Cronin may have found out—

Mr. Combs: It is stipulated that it may be stricken at this time, and the jury instructed to disregard it.

The Court: So ordered. The jury will disregard it.

"Q—Did you observe whether or not she was injured?

"A—She appeared dazed and unconscious and I didn't notice how badly she was hurt.

"Q—Relate the times when you saw America Olvera Pollinger perform on her trapeze.

"A—Practically every time she performed, during the 1937 season, I was right there.

"Q—Relate the times when you observed the rigging upon which she performed.

"A—Every day she performed during the 1937 season.

"Q—Do you know whether or not it was rigging supplied by her?

"A—Yes, it was her own rigging.

(Deposition of William Matlock)

"Q—If so, state.

"A—Yes, it was supplied by her and was her own rigging. [473]

"Q—Have you had occasion to observe the use of rigging for other trapeze acts?

"A—Yes.

"Q—State what experience you had in observing and examining equipment or rigging used for trapeze acts.

"A—I have been a rigger and superintendent of properties for circuses for over thirty years. From 1912 to the present time, I have been superintendent of properties for circuses and prior to that time, I have been a rigger for circuses, I have been employed by Barnum & Bailey, Hagenbeck-Wallace, London Hippodrome, Sells-Floto and Al G. Barnes. I have also built riggings myself and have owned my own rigging which I used in vaudeville in my own acts.

"Q—Describe the equipment used by America Olvera Pollinger during the times you have stated you observed her using the same.

"A—She always used the same equipment—the only thing she ever changed was her wardrobe. I have already explained this in detail in answer to No. 61. She either stood or sat on the trapeze bar.

"Q—Are you familiar with the marine hooks by which the cable extending from the upper cross bar to the lower cross bar upon which America Olvera Pollinger performed?

"A—Yes.

(Deposition of William Matlock)

"Q—Describe the same.

"A—The hooks are like a figure eight and they open up [474] and after the weight of the trapeze goes on them, they are closed—locked, as I have explained before.

"Q—Are you familiar with the attachment of guy wires to the upper cross bar?

"A—Yes.

"Q—Describe the same.

"A—Hooked to the crane bar on each corner. There are four of them—two on each side. The cables are about $\frac{1}{4}$ to $\frac{3}{8}$ of an inch thick and are about 30 feet long.

"Q—How long did it take for America Olvera Pollinger to perform her act?

"A—Between 5 and 6 minutes.

"CROSS INTERROGATORIES

(Interrogatories read by Mr. Marcus; answers read by Mr. Corkery):

"Q—Is it not a fact that your salary was paid by the Al G. Barnes show?

"A—Yes.

"Q—How much was your salary per month?

"A—Well, it was \$40.00 per week plus a \$100.00 bonus, payable at the end of the circus season, plus board, room, transportation, medical aid and the necessary uniform used in attending the shows.

"Q—Were you paid in cash or by check?

"A—By check.

(Deposition of William Matlock)

"Q—Please name the person who paid your salary.
[475]

"A—Mr. Theodore Forestal.

"Q—Is it not a fact that during your entire period of employment you erected the rigging of the trapeze performers in the Barnes show?

"A—I supervised the erection of the rigging of the trapeze performers in the Barnes show.

"Q—Is it not a fact that you erected the rigging of all of the trapeze performers in the Barnes show?

"A—I supervised the erecting.

"Q—Is it not a fact that the erection of the rigging was the work for which you were employed by the Barnes show?

"A—I was employed by the Barnes show to act as superintendent of property which included supervision of the rigging and the actor's equipment.

"Q—Is it not a fact that on September 12, 1937 Howard Mentz was suffering from the result of an accident to his foot and that his foot was in a cast?

"A—Yes.

"Q—Is it not a fact that many employees of the Barnes show erected the rigging of the different performers prior to September 12, 1937?

"A—No. We had the same crew all season and every man on the crew was an expert rigging man and had had several years experience in the circus business.

(Deposition of William Matlock)

"Q—Name the different persons who erected the rigging.

"A—Thomas Parsons, Philip La Bay, Joe Horton, Chandler [476] Miller, Howard Mentz and several others whose names I don't recall right now.

"Q—Who supervised the erection of Miss Olvera's rigging on September 12, 1937?

"A—I supervised it and then it was inspected by Miss Olvera's husband after I got through and then she, herself, look over it.

"Q—When did you first meet Miss America Olvera?

"A—In the spring of 1937.

"Q—When did you speak to Miss Olvera for the first time on September 12, 1937, the date of the accident?

"A—I spoke to her just as she entered the circus tent near the bandstand.

"Q—When and where did this conversation take place and name the persons present. Relate the conversation.

"A—She spoke to me near the bandstand in the center of the circus tent, near the center ring. The conversation took place between Miss America Olvera and myself. There was no one within hearing distance. She said, 'Blackie, where is Pat Valdo and the rest of the Ringling men sitting?' I said in the center section of the grandstand seats and she said, 'I want to do a good act today because Pat Valdo is sitting in the center watching me.' She then asked me how is the rigging and I said everything is O.K. level and perfect and that I had made a careful inspection of it. She looked it over and then said to me, 'Everything is O.K. and fine.' [477] All the time she spoke to me, she appeared to be very nervous and kept her eyes on Pat Valdo.

(Deposition of William Matlock)

“Q—Where were you during the time that Miss Olvera was performing her act on September 12, 1937?

“A—In the center of the tent and near the center ring where Miss Olvera was performing.

“Q—Is it not a fact that you received tips from Miss Olvera each week?

“A—At the end of each week, she would say, ‘Thank you for taking good care of me’ and she would give me a tip.

“Q—State how much you received.

“A—On an average of about \$3.00 a week.

“Q—Is it not a fact that you were employed by the Barnes show and assisted in erecting the rigging of all of the acts in the circus?

“A—I was employed by the Barnes show and superintended the erection of the rigging of the entire show.

“Q—Name the acts in which you supervised the erection of the rigging in the Barnes show.

“A—I supervised the erecting of all the acts.

“Q—When and where were you first employed by the Barnes show?

“A—In the spring of 1935 at Los Angeles, California.

“Q—Describe in detail the manner in which Miss America Olvera’s rigging was erected.

“A—The same thing I described before when that question [478] was asked. There is only one way to put up a trapeze act and that is the way I described in answer to the previous question on that when I told in detail the position and erection of her equipment.

(Deposition of William Matlock)

"Q—Where were you standing at the time that the act of Miss Olvera began?

"A—Near the center pole, near the center of the tent and near the center ring where Miss Olvera was performing.

"Q—How many other acts were in progress at the circus at the time?

"A—Two other acts but I was stationed in the center watching her act which was the feature act. My assistants were watching the other two acts.

"Q—Relate all that you saw of Miss Olvera's act on September 12, 1937.

"A—I saw her act from the beginning to the end and I saw her fall.

"Q—Where was Howard Mentz during the performance of America Olvera's act on September 12, 1937?

"A—He was on crutches and I don't recall exactly where he was but I do know he was around somewhere in the circus tent.

"Q—Relate in detail the description of the other acts.

"A—There were two trapeze acts, one in each end ring and in connection with these trapeze acts, there were some swing ladders used. The other acts had been completely [479] finished and Miss Olvera finished her act alone and was the featured act. The other two acts having finished completely had gone out of the circus tent at the time she fell.

"Q—Did you see America Olvera fall on September 12, 1937?

"A—Yes.

(Deposition of William Matlock)

"Q—Was she through with her act?

"A—She was just finishing her act.

"Q—What trick was she doing when the accident occurred?

"A—She was balancing herself on her knees while swinging on the trapeze bar.

"Q—Who picked Miss Olvera up from the ground after she fell?

"A—I and three of my property men picked her up.

"Q—Isn't it a fact that after she fell she was screaming and made the following remark: 'Blackie, look how crooked the trapeze is!'

"A—No, she was unconscious and said nothing. She never made any complaints to me about the rigging or anything else connected with the equipment used in her act; and she always said, 'Blackie, everything is good and O.K.' and she would praise my work each week and give me a tip.

"Q—Did you see America Olvera's rigging after she fell?

"A—Yes.

"Q—Was there a net supplied for Miss Olvera by the Barnes Show? [480]

"A—No, she always used her own net; she told me to use it and that she didn't want any other net used.

"Q—How many men held the net? Name them.

"A—About ten men. Their names were Thomas Parsons, Philip La Bay, Joe Horton, Chandler Miller, Howard Mentz, a man they called Whitey and the other names I can't recall right now.

(Deposition of William Matlock)

“Q—Did you ever hold the net?

“A—No, I always supervised the holding of the net under orders from her husband; she told me to take orders from her husband and he would direct the handling of the net.

“Q—Was there a safety net provided on September 12, 1937, for Miss Olvera?

“A—Yes, there was.

“Q—Name the men who held the net on that day.

“A—Thomas Parsons, Philip La Bay, Joe Horton, Chandler Miller, Whitey and some others whose names I don't recall just now.

“Q—Did Miss America Olvera ever tell you on occasions prior to the date of the accident and on the day of the accident in the presence of Mickey Grey that the apparatus was not being set up properly?

“A—No, she always told me everything was O.K. and that the apparatus was always being set up properly. The season had been on for six months at the time that the accident occurred and everything was always in good order and she [481] complimented and praised me for my work in having things in such good order. She never complained but on the contrary always praised me for the good work and told me that the tip she was giving me was appreciation for the way in which I took care of her property and took care of her interests and supervised the putting up of her rigging.

“Q—Where were the men who were holding the net standing at the time that Miss Olvera fell on September 12, 1937?

“A—Right underneath the crane bar and right underneath her. Her husband was standing on the side of the

(Deposition of William Matlock)

net near the men and holding the rope so in case anything happened, he could hand her the rope quickly.”

Mr. Combs: That was stricken, your Honor.

The Court: That may go out.

Mr. Marcus: Then go on to question 40.

“Q—Describe where Miss Olvera fell?

“A—She fell inside of the ring on the edge of the net and the net broke her fall.

“Q—How wide is the ring in which she performed?

“A—It is forty feet in diameter.

“Q—Was the net being held within the ring?

“A—Yes.

“Q—Is it not a fact that she was screaming after she was out of the ring, already hurt, she called you and said to you, ‘Blackie, look at the trapeze how crooked it is!}]’ and [482] you immediately looked up and said ‘Yes, I see it.’

“A—No. She was unconscious and said nothing, She always praised my work and never at any time made any complaint whatsoever concerning anything but always praised the way I took care of her interests and supervised the erection of her rigging and everything connected with her act.

“Q—Did you always during the entire season supervise the erection of Miss Olvera’s apparatus?

“A—I did.

“Q—Did Miss Olvera ever complain to you regarding the way in which the apparatus was set up?

“A—No, she always praised me and the manner in which I performed my duties.

(Deposition of William Matlock)

"Q—Is it not a fact that Miss Olvera many times requested you to tell the boys to be more careful about the erection of the rigging?

"A—No, she always told me she was well pleased and many times said, 'Blackie, your work is fine and good' or she would speak to me in Spanish and explain to me how pleased she was with everything and the way I and my crew handled her rigging.

"Q—Did you help to erect the rigging on September 12, 1937, or merely supervise the erection?

"A—I supervised the erection and then inspected the erection of the rigging and after I inspected everything, her husband inspected it and then after he O.K.'d it, she [483] would look over everything.

"Q—Is it not a fact that on many occasions Miss Olvera complained to you about the few number of men holding the net?

"A—No, she never complained to me about the few number of men holding the net or anything else. There was never a shortage of men holding the net and the net was always held by a full crew and held firmly.

"Q—And is it not a fact that as a result of said complaint you yourself assisted in holding the net?

"A—No, I never held the net because I always had plenty of men to hold the net and all I did was to direct and supervise the holding of it.

"Q—Describe in detail Miss Olvera's equipment.

"A—It is the same equipment which I have already described in detail in the other question.

"Q—What trick was Miss Olvera performing when she fell?

"A—She was on her knees balancing herself on the trapeze bar and was bowing to the audience when she fell;

(Deposition of William Matlock)

usually she held one bar with her left hand and bowed with her right but this time she had both her hands free and was bowing with her right hand extended.

“Q—During the season was it the same crew that fixed the rigging? If not, how many changes were made and who were they?

“A—I had an experienced crew of rigging men who had [484] many years of experience and no changes were necessary; my crew stuck with me. There were many rigging jobs in a circus that required greater skill than her rigging and we never had any complaints from any one or any trouble of any kind. Everyone was satisfied with the way I did the work and praised me and my crew for the way things were going.

“Q—Did Karl Pollinger have an act on his own?

“A—Yes.

“Q—How long did it take for Pollinger to put his apparatus together?

“A—About one hour.

“Q—Is it not a fact that Karl Pollinger was continuously busy preparing his own equipment?

“A—No, he had a large crew to attend to his equipment and he would always assist and aid his wife in the performance of her act; he was always present at the time she performed and he wouldn't let anybody hold the web outside of himself. He never had any trouble in getting away to assist his wife because her act only consumed about five minutes.

“Q—Is it not a fact that Karl Pollinger asked you to have men assist him in securing his equipment?

“A—No.

“Q—When did you last see Mr. Karl Pollinger?

(Deposition of William Matlock)

"A—In October, 1937, at the conclusion of the circus season. [485]

"Q—Is it not a fact that you had a conversation with Mr. Karl Pollinger in Hollywood, California, during the 1938 season in the presence of Blackie Wallace, Howard Mentz and 'Ringling'?

"A—No.

"Q—Relate the conversation.

"A—I never had such a conversation.

"Q—Did you ever notice on any occasion that the rigging was not erected properly?

"A—No, the rigging was always put up right and after over years of experience, I know when things are right or wrong. I have never had a single accident in my entire circus career.

"Q—Is is not a fact that in two or three occasions Miss Olvera went up on her trapeze but was unable to do her act, and came down because her trapeze was not properly set up?

"A—No, she always completed her act. She never complained about the trapeze not being properly set up and it was always set up in the best possible manner—in first class condition.

"Q—Is it not a fact that Mickey Grey brought you into the show business as a rigger?

"A—I don't know anyone by the name of Mickey Grey, but I do know a property man by the name of Mickey Graves and that man did bring me into the show business as a rigger." [486]

Mr. Combs: That is all. Our next witness, your Honor, is Chandler Miller in person.

(The court after admonishing the jury took a short recess.)

CHANDLER P. MILLER,

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: What is your name?

A. Chandler P. Miller.

Q. Are you the individual sometimes known as Ringling?

A. I have been known by that name around the circuses, yes, sir.

Q. Are you any relation to the Ringling family?

A. No, sir, I am not.

Q. What is the derivation of that nickname?

A. I was a pretty young lad when I first started in the show business. The first two years of my show experience was with the Ringling shows, and then with other shows. They used to say "That is a Ringling man," and they called me "Ringling."

Q. That was where you got your nickname?

A. Yes.

Q. Where do you reside? [487]

A. No. 8 Essex Street, New York.

Q. What is your present occupation?

A. I am a member of the protective force at the Federal Shipbuilding dock at New Jersey.

Q. Have you ever been in the show business?

A. Yes, sir, quite a long time.

Q. Will you state how long you have been engaged in that occupation? A. I believe about 18 years.

Q. That was prior to your going with this concern in New Jersey? A. That's right.

(Testimony of Chandler P. Miller)

Q. When did you discontinue the show business?

A. At the end of the 1942 season, with the Ringling Bros. Barnum & Bailey Circus.

Q. At that time you took this other job?

A. Shortly after that, yes, sir.

Q. Had you been engaged in the show business without cessation prior to that time?

A. There were intervals in a period of approximately a year or two I was out doing something else. I was in the Army seven years during the other war; also, I worked for an oil company a while, along in the late '20s. I can give you the names of the circuses, in case you would like to have them.

Q. Will you, please, and if possible, the capacity you [488] worked for them in.

A. 1910 and 1912 I was canvas man with the Ringling Bros. Circus. In 1913 I was a rigging man with the Hagenbeck-Wallace Circus; in 1920 I was boss property man with the First Division Military Circus. Then from 1927 to 1932, inclusive, I was a rigging man, two years as an assistant boss property man for the other preceding years, with the Sells-Floto Circus; in 1934 I was employed at the Chicago World's Fair, doing certain kinds of rigging work in connection with the circus they had there in that exposition. In 1935 I was head rigging man with Cole Bros. Circus. In 1936, 1937 and 1938 season, boss property man with the Al G. Barnes Circus.

Q. Were you present during the season when America Olvera fell from her trapeze?

A. I was.

Q. Were you present in the circus tent on that day?

A. Yes.

(Testimony of Chandler P. Miller)

Q. Had you been boss property man that entire season from March to September of that year?

A. Yes, I was.

Q. What were your duties in that connection?

A. I supervised first in the morning the erection of the dressing rooms, the unloading of certain trunks and placing them in the dressing rooms, and then when we got the dressing rooms up the big top would be raised. We would have [489] certain main falls, which we would have to see placed on the bale ring in the big top.

Q. What is the fall?

A. The main fall, block and fall, or double block or single,—the blocks are hung up on the bale ring. The main ring, around the center pole, is about 33 inches in diameter, made out of 3-inch gauge steel.

Q. The main center pole is about 33 inches in diameter?

A. No, the center pole is not that large in diameter. The bale ring around the pole is that large. The center pole is approximately 15 or 16 inches in diameter.

Q. The middle ring, where Miss Olvera performed, was, I take it, located between these center poles?

A. Between No. 2 and No. 3 center poles.

Q. How many center poles were there in the Barnes circus?

A. Four center poles in the Barnes circus.

Q. How far apart were the center poles, being 2 and 3, which you referred to? A. 50 feet.

Q. Below them was a ring?

A. Yes, sir, the ring was below the two center poles.

(Testimony of Chandler P. Miller)

Q. Lying on the ground?

A. The ring was about 39 feet in diameter, up midway between the two poles. In other words, the same interval between the right side of the ring, and the same interval on the left side of the ring, between these poles. [490]

Q. How wide was the ring?

A. 38 feet, 8 inches, to be exact, was the measurement of the inside ring.

Q. The width of the ring itself, I mean to say—the width of the material constituting the ring.

A. Do you mean the outside circumference?

Q. The outside circumference.

A. About 40 feet.

Q. Within about a foot of the width of the ring itself?

A. Yes, almost that.

Q. How high? A. 12 inches high.

Q. Then you state that at the top of each of these No. 2 and No. 3 center poles was a big bale ring, about 36 inches in diameter? A. Yes, sir.

Q. How far from the canvas was the bale ring?

A. The canvas is lashed to the bale ring. The bale ring from the ground is 43 feet, when pulled into position, that is, after the canvas is raised every day.

Q. When Miss Olvera's trapeze was pulled up into the tent, I take it—will you explain to the jury what was done in that connection?

A. Well, as soon as the big top was erected in the morning, and of course, it was pulled up, as I have just explained, 43 feet, and the blocks and falls on the center [491] pole, on this bale ring, the other rigging was placed.

(Testimony of Chandler P. Miller)

I mean by that, that the other falls were hooked on the bale ring that went up with the big tent, and the big tent was guyed out, and the rigging could be attached to the main falls underneath the canvas. They were pulled up by lines running down from each of the bale rings.

Q. These falls are block and tackle, with a hook on it, is that right? A. Yes.

Q. So when this trapeze equipment is hooked on, it is hooked on from one hook from No. 2 center pole and one hook from No. 3 center pole, and the rigging men just pull the pulley blocks and it raises the trapeze?

A. Yes.

Q. The trapeze raises in between the two center poles?

A. Yes, sir.

Q. How far up was the crane bar of Miss Olvera's trapeze raised on the 12th of September, if you know?

A. Yes, sir, it was raised about 34 or 35 feet high.

Q. Will you explain to the jury the approximate manner in which the crane bar hung after it was raised?

A. Yes, sir.

Q. Can you do better by using the blackboard?

A. I can draw a diagram on the board, if necessary.

Mr. Marcus: We have a picture of it, your Honor.

The Witness: I might explain to the court that I am not [492] an artist.

Mr. Marcus: Mr. Combs, will you approach the bench please?

(Discussion off the record.)

(Testimony of Chandler P. Miller)

The Court: I believe that the witness was about to make a statement that he was not an artist. So understood.

A. Yes. I might draw a simple type of perspective of it.

The Court: Go ahead.

A. Let this represent the center pole here. This is the bale ring on this pole. This is one of the center poles. This will be one of the other center poles. You will have to imagine yourself inside of a circus tent, looking toward the grandstand seats, because this, as I am doing it, is from the back side of the show. In other words, if you were standing at the bandstand, looking toward the audience; I am putting little things here to represent the main falls which come from the bale ring, running down, and tied off on a pin on the center pole. The excess rope is coiled around here. This is the crane bar of the rigging, approximately 8 feet below the top of the canvas. Her rigging is in the air, and has a small trapeze hanging down. The sides, I believe, are about 12 feet. I would have to be an artist to draw the stars on the side of it. Roughly, that is what the position of that is. The ring is here. You will have to imagine yourself looking at it back in this position, 38 feet across, 38 feet 8 inches. The guy lines run down the [493] outer poles along here. About four feet from the ring there is a stake driven. There is a little block and tackle down here, which is used on each one of these guy lines to take the slack up by the rigger when he guys out the rigging. There is another guy line running to this stake, with a little block and fall. These are very crude drawings.

(Testimony of Chandler P. Miller)

Mr. Marcus: Your Honor, can Miss Olvera take a seat over here, during this drawing, and be permitted to see it?

The Court: Oh, yes.

A. There is an ascension rope, which is on this side. In other words, they call it a pull-up rope, used to pull the artist up in the rigging to do her act.

Q. By Mr. Marcus: Now, you are putting a dimension on there. I take it to be the distance from the trapeze bar itself to the ground. How much is that?

A. 22 feet.

The Court: Mr. Combs, may I suggest to Mr. Miller, I think we know these distances pretty well, by other testimony, and his testimony is substantially the same. In order to keep from causing confusion with all these other lines, I would suggest that these different lines be marked out. Does that meet with your approval?

Mr. Combs: Yes. I would like to have the distance from the top of the tent.

Mr. Marcus: Miss Olvera's testimony was, and so was Mr. Pollinger's, that,—and two other witnesses—that the [494] distance was four feet; not eight feet.

The Court: His testimony is that it was eight feet?

Mr. Combs: This witness says eight feet.

Q. Now, Mr. Miller, I take it that you are familiar with the erection of the equipment in this tent, are you not? A. Yes.

Q. You were on the day of the 12th of September, 1937? A. Yes.

The Court: (To Mr. Marcus): I don't believe Miss Olvera should discuss this matter with you in a voice that

(Testimony of Chandler P. Miller)

will be disturbing. She can sit right there, and she will have ample opportunity to advise you of anything she desires about it, but it is better, I think, to refrain from discussing it at the present time. Will you read the question and answer, Mr. Dewing?

(Question and answer read by the reporter.)

Q. By Mr. Combs: Did you have anything to do with the erection of this particular equipment on that day?

A. Yes, sir, I had charge of the men that drove all of these stakes, and also I saw that each rigging was put up in the air at the proper place, and the equipment was hung in proper position.

Q. You did so on this particular day?

A. Yes, sir.

Q. That was your customary work with the circus?

A. That was about every day routine. [495]

Q. Was that routine followed on the 12th of September in the same manner that it had theretofore been followed since March of that year? A. Yes.

Q. At each stop the circus made?

A. That's right.

Q. Was there any difference in the manner in which this rigging was erected on the day involved in this accident than on any day theretofore?

A. No, sir, there was not.

Q. I take it there was a net underneath the rigging, was there not?

A. Yes, sir, there was a net, I believe, at the final part of Miss Olvera's show; but it was not during the whole number.

(Testimony of Chandler P. Miller)

Q. That net was approximately how large, held by how many men?

A. Well, I would say it was 12 feet square, and that it was held by eight men.

Q. Where was it held with relation to the trapeze?

A. Directly in the center of this lower bar, in the center of this ring.

Q. Was there any particular reason why it was held there?

A. Yes, sir, because we were instructed to hold it there, because in case it was necessary to move it we would have a less amount of ground to cover, going in any direction. [496] Another thing was, the artist wanted the net quiet while she was doing her number, and did not want to be disturbed by any object moving on the ground below her, because she was doing her balancing act, and it detracted her attention, so we were told.

Mr. Combs: I move to strike that out as calling for the witness' conclusion, and hearsay.

The Court: It may go out, and the jury will be instructed to disregard it.

Mr. Combs: It is stipulated the whole answer may go out, and the jury instructed to disregard it.

Q. Mr. Miller, was that net held and manipulated in the same manner, on the day of the 12th of September, 1937, as it had been theretofore since March of that year?

A. Yes, sir.

Q. No difference, is that right?

A. That's right.

(Testimony of Chandler P. Miller)

Q. Will you relate, making reference to the diagram, the exact manner in which this trapeze was put in place on the 12th of September?

A. In the morning—

Mr. Marcus: Will you read the question again?

(Question read by the reporter.)

Mr. Marcus: I object to it, unless the time is set for it more particularly, your Honor.

Q. By Mr. Combs: You may first start with when it was put [497] in place.

A. This entire trapeze was already hung in the morning before the doors opened and the people ever came in the circus tent, but it was pulled off to one side; in other words, this side was slacked off, and it was pulled over here out of the center of the ring. In other words, it was pulled clear over here toward the center pole. The guy lines were tied on the other pole, by means of a little block and pulley, so that it would be out of the way for the other acts which were performed before this number was on the program. That was the routine that was followed the entire season; and before Miss Olvera's time to go to work, the rigging was pulled up into place, the same as you see it now, guyed out to there with four guy lines.

Q. How was that done? Explain that in detail.

A. One man would slack off, and the rigger on this pole would untie it, and slack off to a marked position on the rope, which was done by sticking a pin where that point was on the rope, and when the rope comes to the point where the mark is, where the rigging goes—it is done that way, because it saves an awful lot of time, and you don't have too much time in doing this job. After it is in place,

(Testimony of Chandler P. Miller)

where you see it, it is tied off, and the rigging man gets hold of the guy line that goes to these stakes,—

Mr. Marcus: Mr. Miller, it is difficult for me to see. So will you stand to the side, please? [498]

A. There being a rigging man at each stake, and there is a little block and fall, and whoever is guying out the rigging, stands back in this position, back of the rigging somewhere outside of the ring, and he can see where this bar is level here, or if it is too low—

The Court: At that point is the top of the crane bar?

A. That is the top of the crane bar.

The Court: For the purpose of the record.

A. The person who runs up the rigging, we will call it, stands here, and directs each one of the riggers with the guy line how much to pull, so he can tell very easily, when the rigging is level. When the top of the crane bar is level, the bottom of the bar here will be level, providing it is hanging in its correct position.

Q. By Mr. Combs: In the particular day in question, did you supervise or observe the guying out of this equipment?

A. I was here watching it being done.

Q. Did you direct the leveling off of the bar, and so forth?

A. It was not for me to do so, no. Mr. Pollinger was doing that.

Mr. Marcus: I object to that as a conclusion, and volunteered.

The Court: It will go out.

(Testimony of Chandler P. Miller)

Q. By Mr. Combs: I will ask you who supervised or observed the guying out of the rigging at that time and place? [499]

Mr. Marcus: That is objected to as calling for the conclusion of the witness, and hearsay.

The Court: It might be calling for his conclusion.

Mr. Combs: If it is the use of the word "supervised," your Honor, I am willing that it go out, and I will try to find another word for it.

Q. Who, on this particular day in question, did the directing of the riggers at these blocks and falls, when the guying out was done?

Mr. Marcus: I object to that as calling for a conclusion.

The Court: Yes, it does. On such an important matter, there should not be any conclusion.

Mr. Marcus: I suggest, your Honor, that the question is leading and suggestive.

The Court: It has been withdrawn.

Q. By Mr. Combs: What was Mr. Pollinger doing at this particular time on the day mentioned?

The Court: Just state what you saw him do, or heard him say, if anything; not your conclusion as to what he was doing, Mr. Miller. It is very difficult for a witness to understand it, and you may have some difficulty.

A. Well, he was indicating which guy line to pull on by pointing with his finger to a certain rigging man out at a certain stake. He would indicate in this manner.

Q. By Mr. Combs: That is, pointing his finger at the guy line? [500]

A. Yes.

(Testimony of Chandler P. Miller)

The Court: Where was he standing, when he pointed his finger? A. Back here.

Q. On the outside of the ring? A. Yes.

Mr. Combs: Indicating a point between the ring and the bandstand? A. Yes, sir.

Q. How long did he remain there in that position?

A. I don't think over a minute or a minute and a half, possibly.

Q. Did he give any signal or make any statement when he departed from that position?

Mr. Marcus: I object to that as assuming facts not in evidence, and leading and suggestive.

Mr. Combs: I don't think so, your Honor. It calls for a yes or no answer.

The Court: Read the question, please.

(Question read by the reporter.)

The Court: You may answer yes or no. Overruled.

A. No, sir.

Q. By Mr. Combs: He just departed, is that right?

Mr. Marcus: I object to that as assuming facts not in evidence.

The Court: Overruled. You may answer. Did you see him [501] walk away. A. Yes, sir.

Q. By Mr. Combs: Prior to that had he done anything with his hands in relation to the process of guying out these lines?

Mr. Marcus: Your Honor, I suggest that is absolutely leading and suggestive.

The Court: I think it is suggestive, and I think that it has been asked and answered.

(Testimony of Chandler P. Miller)

Mr. Combs: I think it has been asked and answered. I will withdraw it.

Q. How long did Mr. Pollinger follow that course of pointing to these respective blocks and falls when the guying out was being done?

A. Do you mean the length of time?

Q. Yes, about how long?

A. As I stated, probably a minute or a minute and a half.

Q. Had he been doing that sort of thing, that is to say, pointing at the riggers guying out these lines, prior to this day? A. Yes, sir.

Q. Was that a regular thing for him to do in connection with Mrs. Pollinger's act?

A. I couldn't say that was regular. I had seen him do it several times.

Q. Was there any signal or prearranged sign in any way [502] when the guying out was completed that was indicated to the men at the blocks and falls?

A. Yes, sir, there was.

Q. What was that sign?

A. Well, he would merely give an indication like that, which would indicate that the rigging was level and in order, to work on.

Q. That was a motion with his hands?

A. Yes, sir.

Q. Did he do so on that occasion? A. Yes, sir.

Q. When did he do that?

A. Well, at the completion of the guying out of the rigging.

(Testimony of Chandler P. Miller)

Q. Was that immediately before he walked away?

A. Yes, sir.

Q. What did Mr. Pollinger and Mrs. Pollinger do thereafter?

A. Well, Mr. Pollinger walked back in this position, which was alongside of the bandstand, and Miss America came in this way, and he walked into the ring with her.

Q. Then what occurred?

A. Mr. Pollinger and one of the property men pulled Mrs. Pollinger up on the rigging by means of this ascension rope.

Q. Then what did Mr. Pollinger do?

A. He held the rope out to one side. [503]

Q. What did she do?

A. She started to go through the routine of her act.

Q. Relate to the court what you saw from then on, to the point where she fell.

The Court: Just take the witness stand now.

Mr. Combs: Will you read the last question, Mr. Dewing?

(Question read by the reporter.)

A. I saw Miss Olvera go in the rigging and start doing the routine of her number, the first part of which, I believe, was standing, and so forth, and balancing in some manner; and I had work to do in the next ring, and wasn't there during the first part of her act.

Q. At what part of her act did you return?

A. At the conclusion of the second and third rings. The act ends there just before Miss Olvera did the final part of her number, and I was engaged there at that time.

(Testimony of Chandler P. Miller)

Q. That is to say, you came back as soon as the other two acts terminated? A. Yes, sir.

Q. What was Miss Olvera doing at that time?

A. Miss Olvera was being swung, I believe, by her husband.

Mr. Marcus: I move that "I believe" be stricken.

The Court: I think he simply means that is his recollection.

A. My recollection; that is right. [504]

Q. By Mr. Combs: At that time you observed her again, is that right? A. Yes, sir.

Q. Did you observe her continuously from then until the time she fell? A. Yes, sir.

Q. Now relate to the court and jury what occurred.

A. She was swung a couple of times by her husband. In this swinging position she was seated on the bar, and the rope was pulled, swinging her forward a couple of times, and then she would take her position on her knees, and place a handkerchief on the lower bar. I saw her get on her knees, place the handkerchief on the bar, and the trapeze was gradually slowing down during this time; and in her attempt to pick up the handkerchief with her teeth she came out of the trapeze forward and struck the ground in front of the net.

Q. About how far from the net?

A. It was a foot and a half; maybe two feet.

Q. What occurred thereafter?

A. Well, Mr. Pollinger and some property men picked Mrs. Pollinger up, and took her out of the ring immediately.

(Testimony of Chandler P. Miller)

Q. Did you hear anything said by her at that time and place? A. No, sir, I didn't.

Q. Where were you just immediately after she struck the ground? [505]

A. I was standing at No. 3 center pole, just back of the center pole; I would say between the center pole and the point where that stake is.

Q. Approximately how many feet from where she fell?

A. She fell toward the forward part of the ring. That would be on the opposite side from me, about 30 feet.

Q. What did you do then, when she struck the ground?

A. I looked at the rigging immediately, because I couldn't get out there to help her in time.

Q. What did you observe in that connection?

A. I observed the rigging in the position such as you see it now.

Q. Was it in the same position then as it had been when it was erected? A. Yes, sir.

Q. At the opening of her act? A. Yes, sir.

Q. Was one side down some five or six, or four or five inches? A. No, sir, it was not.

Q. It was perfectly level? A. Yes.

Q. Was there anything broken on the trapeze?

A. No, sir, I could see nothing broken about it.

Q. What did you do then respecting the trapeze?

A. The trapeze was lowered immediately, and packed in the [506] container which was provided for it, and it was taken out of the ring.

Q. Describe just how it was lowered.

A. By a man being at each one of these center poles, and untying the main falls from the pin on which they are

(Testimony of Chandler P. Miller)

tied or fastened. One man gets at the end of the guy line, at the stake, and unhooks the guy line. That is being done while the men are bringing the box into the ring to pack the rigging in. The whole thing, I imagine, takes not more than a minute and a half.

Q. A minute and a half to strike the whole thing?

A. Yes, sir.

Q. You stated there were marks on these ropes to where the point was to which they should be let out or pulled up; so I take it there would be a uniform point to which they would consistently be tied up to.

A. It would vary each day. There might be a slight variation, because the canvas has a certain elasticity, and where you go out in the morning, and it isn't a dry day, it contracts; if it is a hot day, it expands.

Q. How much would that variance be?

A. Not over six inches.

Q. That would cover it, from very wet to very dry?

A. Yes.

Q. Was the point marked off for driving the guy line stakes? [507]

A. Yes, sir, I got in the habit of stepping that off so far from the center pole, so when the curb ring on the ground was put in place, the stakes would be about four feet outside of the ring.

Q. The location of them was as uniform as was your ability to step them off? A. Yes, sir.

Q. I presume you did that many, many times?

A. Yes.

Q. Can you state you got it more or less precisely and accurately by that time, September 12th? A. Yes.

(Testimony of Chandler P. Miller)

Q. Do you recall who participated in the striking of the trapeze after the accident?

A. The regular rigging men at this particular ring did it. Do you want me to name them?

Q. If you can.

A. I don't know that I can recall the entire amount of them, but I know probably two or three.

Q. Who were the two or three?

A. One was Mr. La Bay; another Mr. Parsons; another was Jack Lysaught; and another Joe Horton. There were others. Those are all I can name right now.

Q. Did you look at the trapeze and its equipment immediately after it had been struck?

A. I looked at it before it had been struck. [508]

Q. Was anything broken, or out of order, or out of place, before it had been struck?

A. No, sir, I saw nothing.

Q. Or any other rigging, or lines, including the falls attached to this trapeze?

A. No, sir.

Q. Did you hear any snap or noise when the fall occurred?

A. No, sir I heard nothing like that.

Q. You heard Mrs. Pollinger testify that the 8-hook at the top, where it hooked into the crane bar, was overlapped, did you not, at the outset of this case?

A. I believe I did.

Q. What effect would that have, if it were overlapped, on the trapeze bar below?

A. Whichever side was overlapped, it would raise that side up.

(Testimony of Chandler P. Miller)

Q. You heard Mrs. Pollinger testify that the clevis attached to the crane bar was hooked up on the elbow or knob of the crook of the block and tackle, on the same side that the figure 8 hook was overlapped on, did you not?

A. Yes, sir.

Q. Isn't it true, or is it true, that that particular fall involved has a slant upward from the trapeze?

A. It does, a slight bit, yes, sir.

Q. In any event, when the trapeze is guyed out it does not have a fall downward, does it? [509]

Mr. Marcus: That is assuming a fact not in evidence, and is leading and suggestive.

Mr. Combs: I will withdraw the question.

Q. What would be the effect on the trapeze bar below, if the clevis were up to the knob of the hook, on that fall on the same side as the figure 8 hook was?

A. Well, it would have a tendency to raise the crane bar on that side.

Q. And the figure 8 hook would not compensate for the shortening of the ring on that side, caused by the tangled up condition of the 8 hook, would it?

A. Well, the thing—

Q. Read the question.

(Question read by the reporter.)

A. No, sir, it would not.

Q. Now, were you about to explain your answer? Go ahead and explain it.

A. The thing I was thinking of was the difference in the size of the hook, with the hooks on the shackle in the top of the crane bar, and the figure 8 hook, and the sister

(Testimony of Chandler P. Miller)

hooks; they are different dimensions. The one on top is much longer than the figure 8 hook.

Q. How much longer is the one on top?

A. The figure 8 hooks on that size rigging, I would say they are at least $3\frac{1}{2}$ or $4\frac{1}{2}$ inches inside of the hook measurements. [510]

Q. That is, the measurement from the nub of the hook to the lowest portion of the hook? A. Yes.

Q. It would be $3\frac{1}{2}$ to 5 inches?

A. $3\frac{1}{2}$ to $4\frac{1}{2}$; maybe about 4 inches.

Q. Would it be possible, with this particular hook involved in this case, for the clevis to become hooked on the nub of the hook?

A. It would have been possible, but it would have been very hard to get the rigging out without it jumping out again, because there is nothing there to hold it. It is not substantial.

Q. Is the surface rough?

A. No, sir, it is sort of rounded, the outer surface, and it would, in my opinion, become disengaged rather easily.

Q. Would it become disengaged at the time any pressure was put on the guy lines? A. Yes.

Mr. Marcus: This line of questioning is assuming something not in evidence. In the first place, he has never testified that that situation ever occurred to him.

The Court: There is no question unanswered.

Q. By Mr. Combs: Was it in the condition she says it was at that time and place? A. No, it was not.

Q. What condition was it in? [511]

A. It was in its normal condition. The hook was engaged in the clevis or shackle.

Mr. Combs: That is all.

(Testimony of Chandler P. Miller)

Cross-Examination

Q. By Mr. Marcus: Mr. Miller, you said you had some work to do in another ring, did you not, at the time Miss Olvera began her act, and you left her ring and went to another ring?

A. I was in the next ring, alongside.

Q. What work did you have to do there?

A. There was another act going on. This act terminated before Miss Olvera's act.

Q. Tell me the work you had to do in the other ring.

A. I had to supervise the moving of the rigging out of the way.

Q. Were you there all the time?

A. No; about a minute and a half.

Q. What did you do there during that period of time?

A. I was in charge of this ring, known as No. 3 ring. I had eight men working there, moving the different props in and out of the ring, and getting ready for the next number.

Q. It was during that period of time you were absent supervising the erection of the rigging in another ring?

A. Not erecting the rigging; moving it to one side, which was done very fast.

Q. You were watching eight men do it, is that correct?
[512]

A. No, I was not watching eight men do it. I couldn't have done that.

Q. How many men were under your supervision?

A. There was about eight men there. I couldn't watch all eight.

(Testimony of Chandler P. Miller)

Q. You say you were gone about a minute and a half or two minutes? A. About a minute and a half.

Q. What was Miss Olvera doing when you left?

A. I had seen her pulled in her rigging. Her first trick, I believe, was the standing trick. She was to do that at the time I left, and went to the other ring.

Q. You did come back, didn't you? A. I did.

Q. Had the other act stopped?

A. The other act was about finished at the time I came back, that is correct.

Q. What was Miss Olvera doing at that time?

A. Well, Miss Olvera was getting ready to do her final trick.

Q. What was she doing at the time you came back?

A. She was sitting on the bar.

Q. What doing?

A. Being swung by her husband.

Q. You saw that? A. Yes. [513]

Q. Tell me, where were you the previous town before you came to Anthony, Kansas?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial. A. I don't know, sir.

Mr. Marcus: I am testing his memory.

The Court: He has answered. He says he doesn't know. A. I don't know what town we were in.

Q. By Mr. Marcus: Do you know what town you were in the day previous to the time you saw this accident?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

(Testimony of Chandler P. Miller)

The Court: Overruled. You may answer.

A. I don't remember the town.

Q. By Mr. Marcus: Where were you on the day following this accident? A. I couldn't tell you.

Q. You do remember, however, all the details of this act, do you? A. I saw that act every day.

Q. This is not a fair representation, is it, of the conditions existing at the top of this tent on the day in question?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: No, Mr. Combs, that is what he is attempting [514] to explain.

Mr. Combs: I object to the use of the word "fair."

The Court: That is what it is supposed to be. He is not supposed to present anything except his views, as he remembers it.

A. I would like to have the question repeated, please.
(Question read by the reporter.)

A. Does that refer to the position of the rigging?

Mr. Marcus: No, I am referring to the entire conditions existing at the top of the tent at the time.

The Court: Just between those two poles?

Mr. Marcus: That's right.

A. That was the position of the rigging hanging between the two poles, as Miss Olvera would have worked on it. Of course, I have made a crude drawing. I don't propose to call that a level representation of the rigging there, but in making the drawing my object was to make it as level as possible.

(Testimony of Chandler P. Miller)

Q. What I mean to say is this: There were other trapeze, there were other riggings, and there were other ropes and other nets on the top. A. No nets.

Q. Wasn't there a net—you know Mr. Bert Nelson, or did know him at that time? A. Certainly.

Q. He had a lion's act? [515] A. Yes.

Q. Wasn't there a net used in his lion's act?

A. That was used in the number preceding Miss Olvera's number.

Q. That was there at the time?

A. I didn't attempt to put that on here.

Q. Put it on there now. I want to get the exact conditions existing there at the time.

The Court: Go ahead.

A. Your Honor, there was no net up at the time. This rigging was pulled into place. The net was put up for the first number in the show, and there was an arena up inside of this ring. At that time this rigging was completely pulled over to one side, and the net was down from the top of the canvas, over the steel cage.

Q. By the Court: There was no net there at the time of Miss Olvera's act? A. That's right.

Q. Where had the net been before Miss Olvera came out for her act, and at the time Mr. Nelson was performing his act?

A. The net would have hung straight down the center of the canvas.

Q. Did it hang down there? A. It did.

Q. It was inside of that net Mr. Nelson had his lion act? [516] A. Yes.

(Testimony of Chandler P. Miller)

Q. That had been removed entirely, had it, before Miss Olvera's act was to be presented?

A. Yes; that rigging was pulled into position, such as you see it now.

Q. What was done with the net?

A. The net was rolled up and put outside of the ring.

Q. It was taken down entirely?

A. Yes, sir.

Q. By Mr. Marcus: When was it taken down?

A. The net for the animal act was taken down immediately upon Mr. Nelson's completion of his act. The animal act was the second number of the circus, and Mr. Nelson was the last one to present his animal act in that arena, before it was taken down. There were other acts besides his which took place in that arena.

The Court: The question is, when was the net, in which Mr. Nelson had his animal act, removed?

A. Immediately upon completion of his animal act.

Q. By Mr. Marcus: Was that before the completion of Miss Olvera's act?

Mr. Combs: I object to that as having been asked and answered.

The Court: He said it was.

Q. By Mr. Marcus: Where was it hanging? Indicate on the drawing, where was that net hanging at the time Mr. Nelson [517] was having his performance?

Mr. Combs: I object to that as having been asked and answered.

The Court: I think it has been. Mr. Marcus. He says it was hanging down the center of the ring.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Is it a fact that the net was shoved over to the side, and not taken down at all?

A. It was not put over to the side, no, sir.

Q. Do you know who took it down?

A. The entire property crew took it down. It takes about 25 or 30 men to remove that arena. That was one of the first things taken down, because the net held the top steel together, and if that wasn't taken down, you couldn't take the arena down.

Q. Is it not a fact that that net was suspended from the top rings around these poles?

A. No, sir, it wasn't.

The Court: Do you mean during Miss Olvera's act?

Mr. Marcus: During Miss Olvera's act.

Q. Tell me whether there were any other trapeze or any other ropes hanging on the top bale rings on these poles at the time Miss Olvera performed?

A. There was another rigging above hers; the flying act; that was clear above. Her crane bar was five feet wide.

The Court: Just mark that.

A. It would be very difficult to mark it in here, [518] because it is a different type of rigging altogether.

Q. But it had a crane bar and four lines to the center pole?

A. It had eight guy lines, because it was 40 feet long.

Q. By Mr. Marcus: Indicate the guy lines.

A. I couldn't do it, because I am not an artist.

Q. You indicated the guy lines on the others.

A. This rigging has four guy lines. I have no way of indicating here the eight guy lines on the single bar.

(Testimony of Chandler P. Miller)

Mr. Marcus: Do the best you can.

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled. Proceed, Mr. Miller.

A. Well, the guy lines would come down this way on either side of the center pole, and in line with the center pole. In other words, out here are stakes; about three stakes on this side of the center pole, and three or four stakes on the other side of the center pole.

Q. By Mr. Marcus: Put the four in on the other side; the other four guy lines. You have put in four. Weren't there some on this end of it?

A. On both sides, yes.

Q. You have three indicated here. There would be three on each side of the center pole; on this side of the center pole, and on the other side; there would be an equal division of all eight guy lines? [519]

Mr. Combs: As I understand it, eight guy lines in all; there would be four on each side, or three on each side?

A. No, there would be eight on each side.

Q. By Mr. Marcus: 'Mr. Miller, have you to the best of your recollection put up the other rigging that was up there? A. The flying act?

Q. Yes.

A. Yes, sir, I have put up the flying act.

Q. This particular flying act that was on there that day?

The Court: He means, have you placed it on the diagram? Was there anything else except that flying

(Testimony of Chandler P. Miller)

act you have referred to, above her rigging, or within the distance between the two center poles?

A. There was a fall used to hang the light up on.

Q. Was it there on the date of Miss Olvera's accident?

A. Yes, sir.

Q. Just indicate where it was. Was it there at the time of her performance?

A. There was a reflected light, with the reflected light downward, in this manner.

Q. Was that light burning?

A. During her final number the lights were out, and this light was burning directly over her act.

Q. By Mr. Marcus: This trapeze you just drew in there, was that as you remember it on the date of this accident?

The Court: Are you referring to Miss Olvera's trapeze? [520]

Mr. Marcus: No, the other.

The Court: He hasn't put in a trapeze. He has put in a crane bar.

Mr. Marcus: A crane bar?

A. It was, and that was above her rigging, and had eight guy lines on each side of it.

Q. What else was there in connection with the crane bar?

A. On the end of the frame was a pedestal board; on the other end of the frame was a trapeze, with the catch act.

Q. Put those on there too, please.

A. Your Honor, I can't see how I can indicate that possibly here.

(Testimony of Chandler P. Miller)

The Court: Do the best you can, Mr. Miller.

A. That would be the way it would look from the end, if you looked straight across the ring.

Q. By Mr. Marcus: Was there a platform?

A. On the other side of the ring.

Q. Put it on the best you can. I want to get everything that was up there.

A. The platform would be pulled to one side out of Miss Olvera's way, by means of a rope and pulley over here; it would be suspended out like that.

Q. By the Court: Mr. Miller, did that second trapeze that you placed in there hang over Miss Olvera's trapeze? I mean, did the bar hang over?

A. This one here, sir? [521]

Q. No, the trapeze. A. This?

Q. No. That's the platform.

A. That is clear at the back part of the ring; it hung clear over the back of the ring, even with the outer part of the ring.

Q. It was pulled up?

A. No, it was not pulled up. It was hanging down, just like it is now, because it was out of the ring. She didn't swing out that far during her number.

Q. How far was it, would you say, from the lines, or whatever you call them?

A. The falls of her trapeze.

Q. About how far away?

A. Well, at least 20 feet.

Q. By Mr. Marcus: You have drawn a crane bar up on the top. Isn't it a fact, Mr. Miller, those were

(Testimony of Chandler P. Miller)

four bars up there; not one single bar; upon which was suspended this platform and the other trapeze?

A. Not four bars, no, sir.

Q. What was it, then?

A. Two swing bars, which were tied back on this pedestal board.

Q. Put those on there, please.

A. They were tied back in this manner, to about here.

Q. All of this did not hang on this one rod, did it?

[522] A. Yes, sir.

Q. Wasn't it a square, 22 feet long, made out of iron rods?

A. No, sir.

Q. How long was it?

A. In the flying act, the rigging was about 40 feet long, and $5\frac{1}{2}$, not over 6, feet wide.

Q. How long would you indicate was the length of the crane bar of Miss Olvera's?

A. Well, I would say 5 feet or $5\frac{1}{2}$ feet.

Q. How long was the length of that other trapeze? The bar, you say, was 40 feet long. How wide?

A. $5\frac{1}{2}$ feet.

Q. Is this the length or width of it?

A. That is the width of it.

Q. And it was 40 feet long?

A. Yes, sir.

Q. What held it up there?

A. It was held up by a main fall, just like this rigging was held up.

(Testimony of Chandler P. Miller)

Q. How many bars were there? If it was 5 or 6 feet wide, and 40 feet long, what held it up there?

A. There was a crow's foot, shaped like your hand, which went from the entire length of this rigging up to a ring. The ring was hooked in this crow's foot, but the cables were made so that the cables ran to one point. [523]

Q. In order for it to be 40 feet long, and 6 feet wide, it would have to be at least enclosed within that dimension, would it not?

A. It would be $5\frac{1}{2}$ by 40 feet.

Q. What caused it to be that wide and that long?

Mr. Combs: I don't think that is an intelligent question.

Q. By Mr. Marcus: He said there was only one crane bar. I am trying to find out if it was four bars fastened together.

A. It was known as the flying act frame.

Q. Draw that frame on there, please.

A. I couldn't draw that on this type of drawing.

Q. You have attempted to draw it there.

A. It is drawn, from a view looking at it straight across the ring.

The Court: That part you have shown would be the side, cross-sectional view, and the width would be about $5\frac{1}{2}$ feet? A. Yes.

Q. 40 feet long? A. Yes.

Q. By Mr. Marcus: In addition to this one rod on the side up there—

The Court: I think he has explained it very clearly. It is a frame, and the frame over-all is 40 feet long and

(Testimony of Chandler P. Miller)

about 5½ feet wide. I don't see that you would want any clearer explanation. [524]

Mr. Marcus: Only to show, your Honor, instead of one bar and one rod, which he said were up there, there was this frame up there.

The Court: He has now called it a frame.

Q. By Mr. Marcus: Now, can you think of anything else that was up there? A. No, sir.

Q. By the Court: Mr. Miller, that framework you have spoken of there was under the light which you have referred to, the center light?

A. Yes, sir; this light was adjustable; it could be lowered to any height desired, but when it was put up in front of the act, or above the act, it was usually above the crane bar.

Q. That framework you have now spoken of was not a solid framework, so that the light could not be seen from beneath, but I assume, from what you have said, there were openings in it, and the light would shine through?

A. Yes; in other words, like this was 40 feet long, there would be another piece of pipe over here connected with the bars across this way.

Q. There were four or five of those bars?

A. Yes.

The Court: I think that is what Mr. Marcus had in mind.

A. I was merely trying to show an end view. I couldn't show it crosswise. [525]

Q. By Mr. Marcus: I will ask you, Mr. Miller, is it not a fact—I will show you this picture—that this pic-

(Testimony of Chandler P. Miller)

ture indicates that frame and the platform and the trapeze?

Mr. Combs: I would object to that question upon the ground that no proper foundation has been laid; it is incompetent, irrelevant and immaterial.

The Court: If he says it is a fair representation, that is sufficient.

Mr. Combs: Your Honor, this purports to be equipment used in Madison Square Garden.

Q. By Mr. Marcus: Is this I have indicated to you a fair representation of the flying trapeze, this one you have described up here, and the platform and the trapeze hanging on it?

Mr. Combs: Same objection.

The Court: Overruled.

A. No, sir, it isn't a view, I would say, which is comparable to this rigging.

Q. By Mr. Marcus: Would you say that was not the rigging? A. Yes, sir, I would say that.

The Court: Any further cross examination?

Mr. Marcus: A few more questions, your Honor.

Q. Now, on this particular day in question, what city were you in?

A. We were in Kansas, the State of Kansas. I can't remember the name of the city. [526]

Q. You don't remember even the name of the city?

The Court: He said he did not remember, Mr. Marcus.

Mr. Combs: It is argumentative.

(Testimony of Chandler P. Miller)

The Court: There is no use asking him the question again. He just said he did not remember it.

Q. By Mr. Marcus: Mr. Miller, wasn't it Anthony, Kansas? A. I believe it was.

Q. Did you see Karl Pollinger come out into the ring on the date of the accident? A. Yes, sir, I did.

Q. Who came with him when he came out?

A. When he first came out he came out by himself.

Q. Didn't he come with anybody?

A. Not to my memory, no, sir.

Q. Isn't it a fact that he and America came out together?

A. Just before she entered the ring they did come from the outer part of the ring, that is, together, but he came ahead of her, and watched the guying out of the rigging, before she ever entered the ring.

Q. You saw him come out? A. Yes, sir.

Q. You say he stood at this point, indicating the outside of the ring? A. Yes, sir, he did.

Q. And you saw him on that particular day indicate with his hands like this? [527] A. Yes, sir.

Q. And you saw the other men at each one of these stakes in the ground, did you, on that particular day?

A. I did.

Q. You remember that, did you? A. Yes, sir.

Q. And did he leave the ring? Did he go out of the tent?

A. He left after the guying out was completed.

Q. You saw him leave? A. Yes, sir.

(Testimony of Chandler P. Miller)

Q. Where did he go?

A. He went over to meet Miss America Olvera.

Q. Tell me who was standing at this post No. 1, this stake? What was the name of the man?

A. I don't remember the name of the property man.

Q. Who was standing at No. 2 post here?

A. Philip La Bay, I am pretty sure.

Q. You are sure of that? A. Yes, sir.

Q. Who stood over here at No. 3?

A. That wouldn't be No. 3. That would be No. 2 pole, on that side.

Q. No. 2 pole, who stood there?

A. I don't remember, sir.

Q. Who stood at No. 4, over here? [528]

A. I remember Tommy Parsons was at one; just which one, I don't remember. I remember there was a man at each one of them. They had no particular post to guy out. They could take any post of any of the four guy lines—any man assigned to do that work.

Q. You did not pay any particular attention to what man was standing at any of these stakes, did you?

A. I know there was a man there.

The Court: Just answer the question.

A. I don't know who was there, no, sir.

Q. By Mr. Marcus: Who came out with America Olvera?

A. Does that mean just before she entered the ring?

Q. No, sir, that means when she came into the tent.

A. I did not see Miss Olvera when she came into the tent until I just saw her after she got in the tent, just previous to her entrance to the ring.

(Testimony of Chandler P. Miller)

Q. Did you see anyone come in with her?

A. No, sir, I did not.

Q. Didn't her husband walk in behind her?

A. At the time of her entering the ring, yes, sir, he did.

Q. Did he enter the ring? A. He did.

Q. You saw him? A. Yes, sir.

Q. Then what did he do? [529]

A. He went over to the ascension rope and assisted by property men helped Miss Olvera into her rig.

Q. Did you look over this rigging before she went to perform her act? A. Yes, sir.

Q. Did you see the lower bar? A. I did.

Q. Was it level? A. Yes, sir.

Q. Where was the entire rigging before she came into the tent?

A. The rigging, before she came into the tent, was like you see it hanging there right now.

Q. Where was this rigging when the other act was going on previous to Miss Olvera's act?

A. It was pulled over to the side, as I explained before.

Q. Over here on this side?

A. Yes, sir, I believe it was that side.

Q. But it was still attached, was it, to the main poles in the manner that you have indicated?

A. The hooks were up there, yes, sir, such as that.

Q. Who brought the apparatus off of this pole and put it in the center of the tent?

A. Mr. La Bay and Jack Lysaught. There was one on each pole. That was their regular station.

(Testimony of Chandler P. Miller)

Q. You saw them do that? [530] A. Yes, sir.

Q. Did you see them tighten up any of the lines that brought that trapeze over?

A. Jack Lysaught, yes, sir; Philip La Bay, no, sir.

Q. What did you see Jack do?

A. I saw him slack off the side over there, to let the rigging over, and I know he went over to these other guy lines; just which ones, I couldn't say.

Q. What were you doing when these men were doing their work?

A. I was standing back here where I could watch them doing their work.

Q. You saw them do it? A. Yes, sir.

Q. You were supervising their work?

A. It was under my supervision.

Q. Did you hear that deposition that was read here this afternoon?

Mr. Combs: That is objected to as argumentative.

Q. By Mr. Marcus: Did you hear that deposition read here this afternoon?

A. I heard a lot of depositions read. I don't know to which one you refer.

Q. Did you hear the deposition of Blackie Williams?

A. Yes, sir.

Q. Did you hear him state some four or five times in [531] that deposition that he was the supervisor of rigging?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Who was the supervisor of rigging, now; was it you or Blackie Williams?

A. Blackie Williams was the boss property man. In other words, he was boss of the whole department. I was his first assistant. In other words, I was ranked on the department next to him. I received my orders from him, from Mr. Cronin, also Mr. Robert Thornton, equestrian director of the show.

Q. In other words, you took your orders from Blackie Williams? A. Yes.

Q. Then you were not supervisor of rigging, were you?

Mr. Combs: I object to that as calling for the conclusion of the witness.

A. I supervised a lot of rigging in the show.

Q. By Mr. Marcus: Tell me when this rigging went up.

A. It went up after the flying act was put up every morning.

Q. It went up in the morning, didn't it?

A. Yes, sir.

Q. When was this trapeze erected?

A. That is when it was erected. [532]

Q. In the morning? A. Yes, sir.

Q. And it hung there during the day, and was hanging there during all the preceding acts?

A. During the preceding acts to hers.

Q. Was it ever, on this particular date, brought in in this box just before Miss Olvera was to perform, and hoisted at that time? A. No, sir, it was not.

(Testimony of Chandler P. Miller)

Q. Now, Mr. Miller, when this trapeze was hung over on this side, all of these lines, indicating the left from where I stand, were necessarily longer, weren't they, in order to reach over to this pole?

A. These lines were taken off the left side, and carried over to the right side.

Q. All of these lines on the top, I mean?

A. Yes, that side had to be let over to let the crane bar go over on the right hand side of the ring.

Q. That would of necessity drop the left side of this crane bar, wouldn't it?

A. Not necessarily.

Q. Well, did it?

A. I didn't see it in that position.

Q. What position did you see this crane bar on this pole?

A. The crane bar was simply moved over to the right by [533] letting off the main fall on the left side, and taking up the main fall on the right side; just merely pulled over so it would be out of the way of Bert Nelson's act, and the other act preceding Miss Olvera's number.

Q. Did you testify it was tied onto this pole, the right hand pole?

A. I believe I did.

Q. How was it tied?

A. By slacking off the main fall on the left side, and taking up on the main fall on the right side, it simply pulled it over.

Q. Wasn't the entire trapeze tied to the pole?

A. It may have been. I couldn't state that.

Q. Was it on this particular day?

A. I couldn't say.

(Testimony of Chandler P. Miller)

Q. You don't remember that?

A. I don't remember that.

Q. When it was brought back did you see that?

A. Yes, sir, I did.

Q. Who brought it back?

A. The man slacked it off on the right hand side, which was Jack Lysaught, and Philip La Bay took up the slack on the other side, which pulled it in position in the center, in which it hangs now.

Q. Did you look up at the top of the crane bar?

A. I did. [534]

Q. Did you see it? A. I did.

Q. What did you observe about it, if anything?

Mr. Combs: At what time?

Mr. Marcus: When it was brought back.

A. I observed it hanging there just as it is now.

Q. Was it level at that time?

A. Yes, sir, it was.

Q. And where was Mr. Pollinger at that time?

A. It was level, but the guy lines were not attached yet.

Q. It was level up here?

A. It was approximately level.

Q. What happened to the lines that you have indicated here? When this is level, are they taut?

A. Yes, sir.

Q. They are tight? A. Yes, sir.

Q. Who tightens them?

A. They would become tight by the men guying out on the stakes below, by taking in on the guy lines; that naturally would tighten the main falls in the top.

(Testimony of Chandler P. Miller)

Q. These are sort of pulleys?

A. That is known as a double block or pulley.

Q. There is a pulley over here?

A. That's right.

Q. A pulley on this corner, one up on the top of the
[535] tent? A. Yes.

Q. What causes these lines to become tight that hold the crane bar up?

A. By a downward pressure the guy lines naturally straighten out the falls and make them straight.

Q. Was there anything you lined up the crane bar with?

A. It isn't necessary to level with any object. You can tell by glancing at anything whether it is level. Experience teaches you that.

Q. You didn't level it up with anything?

A. Not particularly. I leveled it by eye alone.

Q. Let us assume that the clevis was overlapping, and the 8-hook—

A. This is not the clevis. It should be in this place.

Q. Let us assume that it was overlapping; at the same time was it not possible, by pulling on these guy lines to have made this trapeze bar absolutely level?

A. I don't believe it could be possible, because there is a difference in the dimensions of the hook hooking the main fall in the right hand edge of the crane bar and the figure 8 hook is a smaller dimension than the other one.

(Testimony of Chandler P. Miller)

Q. These were all adjusted on pulleys?

A. Yes, but that had nothing to do with hooks and blocks.

Q. But you did pull these lines and adjusted them to make the trapeze level, didn't you? [536]

A. That is the process of guying out.

Q. So, if the crane bar is slightly out of line, or the trapeze bar is slightly out of line, you can easily adjust it to become level by pulling on these guy lines over here, couldn't you?

The Court: Will you read the question?

(Question read by the reporter.)

A. No.

Q. By Mr. Marcus: How do you level up the trapeze then, if not by pulling and tightening the guy lines?

A. You level it by pulling the guy line, but if the hooks are overlapped, it couldn't be level. The only thing to do would be to straighten out the hooks, or straighten the guy line, or it might straighten out itself.

Q. Did you ever have a hook overlap?

A. Yes.

Q. When?

A. At the Detroit winter circus, in 1930.

Q. I am talking about the trapeze itself.

A. No.

Q. How do you know it couldn't be leveled out by pulling the guy lines?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: It is argumentative.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Did you at any time to your knowledge [537] ever level out a trapeze?

Mr. Combs: I object to that as having already been asked and answered.

Q. By Mr. Marcus: Level out this trapeze, when the bottom trapeze bar wasn't level.

A. I have seen trapeze bars where the top would be level, and the bottom would not be level. It is always because one of the sides of the trapeze was longer than the other side.

Q. I am asking about this particular trapeze.

A. Not on this trapeze, no, sir.

Q. You never experienced that before?

A. No, sir.

Q. Did you ever hold the net?

A. No, I never did.

The Court: Mr. Marcus, is there to be very much more of this cross examination?

Mr. Marcus: Not much more.

The Court: When you say not much more, what do you mean by that?

Mr. Marcus: I have some other matters taken from this man's deposition.

The Court: It is almost 5:00 o'clock. But before we adjourn I would like to ask Mr. Miller:

Q. Mr. Miller, when you say Mr. Pollinger was out there, and held his hand out in front of him, indicating to those at [538] the guy ropes, was he looking at the trapeze bar, do you know?

A. Yes, sir, he must have been.

(Testimony of Chandler P. Miller)

Q. After he had done that to a certain extent then he held his hands, and no change was made in the guy ropes? A. That's right.

Q. When you have done that, has it been for the purpose of leveling the trapeze?

A. Yes, sir, the reason—

The Court: You may answer yes or no, and you can explain. It was for that purpose? A. Yes.

Q. Now you may explain.

A. We got up a system of signals, because lots of times you were required to change the riggings during the process of the performance, when there is a lot of music going on and noise in the tent. You could simply point to a man, and indicate the guy line to be pulled over, and he would start to pull, and you would stop him by a motion of your hand.

Q. Just as though someone were approaching you, and you desired to have him stop, and he couldn't hear you, you would hold your hand up, and indicate by the palm of the hand toward him to stop? A. Yes.

Q. Simply as a switchman or a brakeman might, in the process of controlling the movement of trains—to that [539] similar effect? A. Yes, sir.

(The court after admonishing the jury here took an adjournment until 10:00 o'clock a. m., Tuesday, January 11, 1944.) [540]

Los Angeles, California, Tuesday, January 11, 1944;
10 a. m.

(Stipulated that the jurors were present and in their places.)

C. P. MILLER

(Recalled.)

Cross Examination

(Resumed.)

Q. By Mr. Marcus: Mr. Miller, I presume that you are acquainted with the appearance of the tent on the outside? A. Yes, sir.

Q. I will ask you whether or not that is a correct photograph of the tent of the Al G. Barnes Circus for the season of 1937.

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial. In the first place, I haven't seen that document; but even so, I take it to be a printed copy, not a photograph. We object to this as incompetent, irrelevant and immaterial, and no proper foundation laid.

The Court: Read the question.

(Question read by the reporter.)

The Court: Overruled. You may answer.

Mr. Combs: If your Honor please, may I say one thing more about the objectionable feature; this is not a photograph itself. This is a printed copy of something.

The Court: On that basis the court will sustain the objection.

Q. By Mr. Marcus: Is that a fair representation of the [541] tent for the season of 1937?

Mr. Combs: I object to that as calling for a conclusion of the witness; no proper foundation laid.

(Testimony of Chandler P. Miller)

The Court: Overruled. You may answer.

A. I would say this is not a true replica of the big top. However, it is a similar likeness to the menagerie tent.

Q. By Mr. Marcus: Would you say that was the menagerie tent?

Mr. Combs: Same objection.

A. It is a similar top to the menagerie top.

Q. By Mr. Marcus: Does that photograph or representation indicate that is for the season of 1937, and shows the main entrance?

The Court: You don't need to argue.

Mr. Combs: I would like to respectfully appeal to your Honor—not that this is a particularly significant matter, because I doubt it, but under the rules of evidence, a proper foundation must be laid. I ask that the evidence so far be stricken.

The Court: There has been none since he said it did not represent the main circus; he said it just represented the menagerie.

Mr. Marcus: Have you seen this?

Mr. Combs: Yes.

Q. By Mr. Marcus: I show you a photograph, and ask you whether or not that photograph is an actual photograph of the [542] main top of the Barnes show for the season of 1937?

Mr. Combs: If your Honor please, I don't want to make it appear to the court that I consider this an extremely important matter, because I don't, but the rules of evidence should not be abused, because there has not been

(Testimony of Chandler P. Miller)

any showing that he knew anything about this before, or knew from what angle it was taken, or who the photographer was. Those are necessary elements for identifying the photograph.

The Court: I would like to have you furnish some authority on that.

Mr. Combs: We have furnished authority on that point. I will furnish authority when I have an opportunity, but I cannot do it at this moment.

The Court: The court did not expect you to do it at this moment. The court will take a recess, and see if you can find some authority for that. The jury will retire to the jury room and remain there until called by the bailiff, bearing in mind the admonitions of the court heretofore given you.

(Short recess.)

The Court: The jurors are all present.

Mr. Combs: In the light of our examination of the law in chambers, I wish to withdraw my objection. In my opinion the court's ruling is correct.

The Court: It may be withdrawn, and the court appreciates your statement. [543]

Q. By Mr. Marcus: Mr. Miller, will you examine this photograph, and tell me whether or not that is a correct photograph of the main top of the tent for the 1937 season?

A. It is very difficult to tell, because that only shows the sectional view. I couldn't say.

(Testimony of Chandler P. Miller)

Q. Couldn't you tell us whether, according to that sectional view, that is a correct photograph of the tent?

A. It is a correct view of the circus tent. I couldn't say it is the Barnes show, because it does not show enough detail to answer that question.

Q. What is your recollection of the Barnes tent, outside of this photograph?

A. The Barnes circus big top contained four center poles. It doesn't show but two there, I believe.

Q. Let us look at it carefully. Doesn't it show four poles in that photograph?

A. Not center poles, no, sir.

Q. You don't see four center poles there?

A. No, sir.

Q. What else do you remember about the details of the Barnes main top for the 1937 season?

A. I know that the middle point in the big top, the measurement from center pole to center pole was approximately 50 feet. I know the height of the top of the tent from the ground to the bale rings was 43 feet. I know that the measurement of the big top was 160 feet.
[544]

Q. What holds the canvas up?

A. The center poles and quarter poles.

Q. What supports the canvas across between the center poles?

A. It is supported by ridge rope between two bale rings.

Q. Was there a cable on top of the two poles?

A. There were guy lines running out from the poles, yes, sir.

(Testimony of Chandler P. Miller)

Q. What held the two poles together?

A. Guy lines.

Q. Didn't those two guy lines run from both poles, joining them?

A. There is a ridge rope up there, but it was slacked off at the time the tent was in the air.

Q. How much was it slacked off in the center, between the two poles?

A. It is always slacked off.

Q. Is the top of the tent slacked off in the center?

A. There is a slight sag.

Q. How much of a sag?

A. Not more than a foot or a foot and a half.

Mr. Marcus: I ask that this photograph be marked for identification at this time.

Mr. Combs: No objection.

The Court: Let it be marked Plaintiff's Exhibit 7.

Mr. Marcus: I ask that this photograph be marked for [545] identification at this time.

The Court: Let it be marked Plaintiff's Exhibit 8 for identification. You refer to that as a photograph. I don't think it is a photograph.

Mr. Marcus: It is a rotogravure.

The Court: Whatever it is, it is the first page of this pamphlet.

Mr. Marcus: That's right.

The Court: That may be marked Plaintiff's Exhibit 8 for identification.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Mr. Miller, did you say there were two ropes holding up the canvas of the tent between the two main poles?

A. There is a ridge rope which the canvas is raised to; that is, the canvas indicated at the line showing the two bale rings.

Q. How many ropes are there between the two rings holding up the canvas of the tent?

A. There is nothing holding up the canvas between the rings.

Q. Between the two main poles how many ropes hold up the tent?

A. Guy ropes outside, not inside, of the tent. On the center poles are the main falls which hold up the bale ring. The main fall is fastened inside, and has a pin through the poles. [546]

Q. Then, do I understand you, Mr. Miller, there are no ropes on the inside of the tent running from the main cable between the two poles holding up the canvas of the tent?

A. No, sir, there is nothing holding up the canvas, because the bale ring supports the canvas, such as you see indicated there.

Q. What holds the canvas up as it goes from the edge of the tent, from the top to the side?

A. Quarter poles.

Q. Just poles? A. Yes.

Q. No ropes? A. There are stay ropes.

Q. How many are there?

A. A number of stay ropes, about six feet apart, from the bale ring out to the edge of the canvas.

(Testimony of Chandler P. Miller)

Q. Between both poles? A. Yes.

Q. Six feet apart? A. Approximately that.

Q. How far is it between the two main poles?

A. About 50 feet.

Q. About how many ropes would there be around the edge of the tent?

The Court: You can figure that out.

Mr. Marcus: Approximately ten? [547]

A. I would say about that.

Q. Those all come up to this top ring or cable, don't they?

A. There is no cable, but there is a sort of what we call a ridge rope, made out of manila rope.

Q. You don't call it a cable; you call it a ridge rope?

A. That's right.

Q. Those are visible from the inside of the tent?

A. Yes.

Q. Those likewise are over here?

A. They are tied up; tied very short, but up out of the way.

Q. Can you step down here, and draw those?

A. I can indicate the position approximately where they are. You can't draw them.

Q. If you will, please.

A. They are pretty close to this ridge rope. They don't hang down more than about three or four inches, when they are tied.

Q. Run them down, please, to the bottom of the tent.

A. They don't run down to the bottom of the tent.

(Testimony of Chandler P. Miller)

Q. Didn't I understand you to say a few moments ago that they ran out to the edge of the tent?

A. They are the guy ropes on the center pole. The guy ropes on the center pole run clear out to the edge of the tent. There are also ropes which the canvas is sewed to, [548] which run clear out, about ten feet apart. They are on a line with the stay ropes, which you see in the center of the ring.

Q. Can you draw those? A. I can't do it.

Q. Isn't it possible to do it?

A. Not on that drawing.

Q. Why?

A. You can't show the outer part from the inside.

Q. Are those ropes outside?

A. On the under part of the canvas, sewed to the tent.

Q. Inside of the tent? A. Yes.

Q. You can't do it?

A. I can't show it on that drawing, no, sir.

Q. Did you ever get in touch with America Olvera after the accident?

A. Not that I recollect, to my knowledge.

Q. Did you ever send her a telegram?

A. I never did.

Q. I will ask you to read that telegram to yourself, and tell me whether or not you didn't send it to her.

A. I don't recall sending that myself. Mr. Williamson may have sent it. I didn't.

Q. Your name is Ringling Miller?

A. My name is Miller. They call me Ringling. [549]

(Testimony of Chandler P. Miller)

Q. You don't remember sending this telegram?

A. Not me, no, sir.

Mr. Marcus: May it be marked for identification?

Q. Where were you on April 13, 1939?

The Court: You are asking that it be marked for identification?

Mr. Marcus: Yes, your Honor.

The Court: It may be marked Plaintiff's Exhibit No. 9.

A. I did not understand your question.

Q. By Mr. Marcus: I asked where you were on or about April 13, 1939.

A. On April 13, 1939, I was employed by the Ringling Bros. Barnum & Bailey Circus.

Q. Where were you at the time?

A. Well, we were in the eastern section of the United States about that time. I don't remember the location of the show at that particular time.

Q. Weren't you in New York on that date, performing at Madison Square Garden, on April 13, 1939?

A. No, sir.

Q. Did you and Blackie Wallace and Ned Huey and the rest of the riggers get together and send a telegram to Miss Olvera regarding her case?

A. No, sir.

Q. Read this telegram, and see if that doesn't refresh your memory. [550]

Mr. Combs: May I see it? I don't see his name on that at all.

Mr. Marcus: Do you see the word "riggers"?

(Testimony of Chandler P. Miller)

Mr. Combs: "And riggers," yes.

Mr. Marcus: Read this telegram, and tell me whether or not you and the other riggers didn't send that.

A. No, sir.

Mr. Marcus: May this telegram be marked for identification?

The Court: Let it be marked Plaintiff's Exhibit 10 for identification.

Q. By Mr. Marcus: Mr. Miller, did you say that Mr. Williamson was your superior, your boss?

A. Yes, sir, he was.

Q. Was he your boss on the date of this accident, September 12, 1937? A. Yes, sir.

Q. What did you do just before Miss America went on to perform?

A. Just before Miss America went on to perform I was standing in the rear of the ring, in the vicinity of the bandstand, watching her rigging being guyed out.

Q. You were supervising it at that time?

A. No, sir, I was not.

Q. What were you doing with reference to her rigging?

A. I was watching it being guyed out. [551]

Q. What did you do with reference to her rigging that afternoon? A. Nothing at all.

Q. You had absolutely nothing to do with Miss Olvera's rigging that afternoon?

A. I did not touch her rigging at all.

Q. So you had nothing to do with her rigging, the supervision of it, or otherwise, did you?

(Testimony of Chandler P. Miller)

Mr. Combs: I object to that as calling for his conclusion.

Mr. Marcus: I will reframe it.

Q. Did you in any way direct or tell anyone to oversee the placing of her rigging in position for her performance that afternoon?

Mr. Combs: I object to that as calling for the conclusion of the witness, and compound; incoherent, unintelligible, incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Marcus: What did you do, Mr. Chandler Miller, with reference to Miss America's rigging that afternoon, before she went on, at any time during the performance of the show that afternoon?

A. Prior to her going in to do her number I stood at the spot I have just indicated, and I watched the rigging being guyed out.

Q. Is that all you did, was to watch it? [552]

A. That is all.

Q. You had nothing to do in connection with it, did you?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: He may answer. Overruled.

A. I had nothing to do other than just as I have explained.

Q. By Mr. Marcus: You had nothing to do, did you?

Mr. Combs: I object to that as argumentative.

The Court: Sustained.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: You didn't do anything with reference to her rigging, did you?

A. No, sir, I did not.

Q. You say you stood there watching what was being done?

A. I did.

Q. Isn't it a fact, Mr. Miller, that the only time that you had anything to do with Miss Olvera's rigging was in the original erection of it in the morning, when the tent went up?

A. I looked at it.

Q. Can you answer the question yes or no?

A. I watched the rigging guyed out every day.

Q. Guyed out every day?

A. Yes.

Q. Can you answer the question: That the only time you had anything to do with Miss Olvera's rigging was in the morning when the big top went up? [553]

Mr. Combs: I object to that as having been asked and answered many times.

The Court: You may answer yes or no, and explain your answer, if it is necessary to explain it.

A. Well, I would answer yes, because I did supervise the erection of the rigging in the morning. I was always in a position to watch the guying out, every performance.

Q. You remember giving your deposition, don't you, Mr. Miller?

A. I believe I do.

Q. Well, do you?

A. Yes, sir.

Q. And that deposition was given about two and a half or three years ago, wasn't it?

A. No, sir.

Q. How long?

A. Well, it was in December, I believe, 1939.

(Testimony of Chandler P. Miller)

Q. That's more than three years ago, isn't it?

A. Certainly it is.

Q. Is your memory any better today than it was then? A. What?

Q. Is your memory better today than it was at that time, in reference to what transpired in 1937?

A. No.

Mr. Combs: I object to that as argumentative.

The Court: It has been answered. [554]

Mr. Marcus: Will you stipulate with me, counsel, that he testified according to the statements herein?

Mr. Combs: What are you reading from?

Mr. Marcus: There will be a lot of places.

Mr. Combs: Give me the page of the transcript.

Mr. Marcus: Page 510, question 13.

Mr. Combs: So stipulated.

Mr. Marcus: I can skip that question now, because I will come back to it, and go to 510, question 20:

"Q—did you work for the Al G. Barnes Amusement Co. on September 12, 1937, as a rigger?

"A—Yes, sir.

"Q—Did you know America Olvera Pollinger, the plaintiff in this action?

"A—Yes, sir.

"Q—When did you first meet her?

"A—I met her first on the opening of the circus season in 1937 in San Diego, California.

"Q—Did you ever act as a rigger for her?

"A—No, sir.

(Testimony of Chandler P. Miller)

“Q—Did you ever act as a rigger on any equipment used by America Olvera Pollinger?

“A—The only thing I have ever done with respect to Miss Olvera was to supervise the original erection of her rigging each morning in the tent.

“Q—State what times you acted as a rigger on any [555] equipment used by America Olvera Pollinger?

“A—Every day I acted as I have described in my answer to question 24.

“Q—Did you act as a rigger for America Olvera Pollinger on that day?

“A—Only in the capacity of supervising the original erection of her rigging in the tent that morning.

“Q-30—

“A—I supervised the original erection in the tent that morning.

“Q-37—”

Mr. Combs: You had better read the questions, counsel.

“Q-37—Did he participate in or help you in putting up America Olvera Pollinger’s rigging on September 12, 1937?”

Mr. Combs: You didn’t read 30.

“Q—Did you do anything in the erection of the America Olvera Pollinger equipment or rigging on that day?

“A—I supervised the original erection in the tent that morning.

(Testimony of Chandler P. Miller)

"Q-37—Did he participate in or help you in putting up America Olvera Pollinger's rigging on September 12, 1937?

"A—No, sir. Mr. Pollinger did not help me with the original erection of the apparatus which I supervised in the morning but on that day he supervised as usual the leveling off of her apparatus just prior to her performing on the same."

Mr. Marcus: Page 523: [556]

"Q—Is it not a fact that during your entire period of employment you erected the rigging of the trapeze performers in the Barnes show?

"A—I did not actually erect the rigging, but I supervised the original erection in the tent in the morning of each day.

"Q—Who supervised the erection of Miss Olvera's rigging on September 12, 1937?

"A—I did.

"Q—Did you act as a rigger for Miss Olvera on that day?

"A—No, sir, only supervised the original erection of her rigging in the tent on that morning.

"Q-45—Did you always during the entire season supervise the erection of Miss Olvera's apparatus?

"A—Yes, sir. But I only supervised it when it was originally put into position in the morning. I did not give it the final inspection.

"Q-47—Did you help to erect the rigging on September 12, 1937, or merely supervise this erection?

"A—I supervised it in the morning as I have explained in answer to question 45."

(Testimony of Chandler P. Miller)

Q. Mr. Miller, didn't you hold—

The Court: Mr. Marcus, did you ask him whether those questions were asked, and those answers given?

Mr. Marcus: Counsel stipulated with me that they were.

The Court: Proceed. [557]

Q. By Mr. Marcus: Didn't you hold the net that day? A. No, sir.

Q. Let me try to refresh your memory, sir. You say George Williamson was your superior? That was your testimony before? A. He was.

Mr. Combs: What page are you reading from?

Mr. Marcus: 500. Mr. Miller, is it not a fact—and for the purpose of refreshing your memory—that you did hold this net, I will refer to the testimony of Mr. George Williamson to this effect:

“Q—How many men held the net? Name them.

“A—About ten men. Their names were Thomas Parsons, Philip La Bay, Joe Horton, Chandler Miller, Howard Mentz, a man called Whitey and the other names I can't recall right now.”

Q. By Mr. Marcus: If your superior officer so testified, as it is in this record, does that not refresh your memory of the fact that you did hold the net?

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial; using the testimony of someone else in an attempt to impeach this witness. Obviously this was not this witness' testimony.

The Court: Objection sustained, and the jury instructed to disregard the question, and not to draw any inference from its asking. [558]

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Mr. Miller, you have not been employed by the show since what year?

A. The Barnes show, 1938 was the last year I was there, Al G. Barnes.

Q. You were in Hollywood during the year 1939?

A. Yes, sir, we showed there every year.

Q. Are you sure you were there in 1939?

A. Not the Barnes show, no, sir.

Q. Were you there with the Ringling show in 1939?

A. Yes, sir, I was.

Q. Where did you perform that year?

A. We were not in Hollywood. We were out to what is called Exposition Avenue, I believe it is, in Los Angeles.

Q. Do you remember what month that was?

A. I believe it was September. I am not positive.

Q. That was after the month of April? Are you sure of that, 1939?

A. Yes, it was after the month of April. It was in the fall of the year.

Q. Did you not see America Olvera there on the grounds that year?

A. I don't remember seeing her.

Q. Did you see her in 1938?

A. I don't remember seeing her in 1938.

Q. That is your best memory now, that you do not remember seeing her? [559]

A. That's right.

Q. Did you have a conversation with her in the presence of Blackie Wallace, Ned Huey and other members of the rigging?

A. No, sir.

(Testimony of Chandler P. Miller)

Q. Is it your testimony now that you had none, or that you do not remember?

A. I don't remember having such conversation.

Q. Is it not a fact that at that time you told her that you—

Mr. Combs: We object to the recital of the conversation. The damage will be done. The purpose of counsel's inquiry will be done if he recites any conversation this witness says he does not remember; if he hasn't had any.

Mr. Marcus: No, he said he did not remember.

Mr. Combs: He did not see her. I don't want counsel to recite a long conversation, and ask if he had it, because he will probably answer: I don't remember; I do not know; and the question will be improperly admitted.

The Court: I think that is the only way he can lay his foundation for impeachment. Read the question and objection.

(Record read by the reporter.)

The Court: You did not give the time, any more than the year 1938. Reframe the question.

Q. By Mr. Marcus: Did you not have a conversation with America Olvera during the month of September of 1939 at the grounds of the Ringling show? [560]

A. No, sir.

Q. While it was performing in Los Angeles?

A. No, sir.

Q. Your testimony now is you did not?

A. I did not.

Q. Did you not testify before that you did not remember having such conversation?

(Testimony of Chandler P. Miller)

The Court: Don't argue with the witness, Mr. Marcus; and you should complete your question all in one. But, in any event, you have laid the foundation as to time, place and parties present.

Q. By Mr. Marcus: Is it not a fact, Mr. Miller, that you told—

Mr. Combs: Just a minute, before he asks that question; I object to a recital of a conversation, or purported conversation, which this witness has said he did not have. The purpose of the question can be obvious; that is, to inform the jury of a fact that is non-existent at this time in the record. Without telling counsel the way to proceed, there should be evidence of the conversation produced independently, because this man says no, and his answer can't possibly be anything than: "No, I did not have any such conversation."

The Court: As I understand the rules of evidence, the party seeking to impeach the witness will have to ask—I don't know of any other way to do it, Mr. Combs—he will [561] have to ask if a certain conversation was not had, or a certain statement made at a certain time and place, in the presence of certain parties, and then state what it is. That is the only way the court knows of doing it.

Mr. Combs: Mr. Marcus, as an officer of this court, is violating the rules of the court, unless you intent to prove by some witness that a certain conversation did take place.

Mr. Marcus: That is correct, and I am willing to go one step further with counsel, to show my good faith, if counsel will not object when the evidence does come in

(Testimony of Chandler P. Miller)

from the witness who will testify to it, I will not ask the question now. If that is agreeable to counsel.

Mr. Combs: Go ahead and ask the question, and let the court rule on the objection.

Q. By Mr. Marcus: Did you not tell Miss Olvera, at that time and place, that you were working with the Cristianis assisting them in their act that was being given in the other ring at the same time that Miss Olvera's act was given; that you did not see this accident at all, and that you would like to be of assistance to her, and you told her you had sent, with the other riggers, a telegram advising her to this effect. in April, 1939?

A. I said no such thing, no, sir.

Q. Isn't it a fact, Mr. Miller, that you did assist the Cristianis in the performance of their act at the time Miss Olvera's act was going on? [562]

A. I did not.

Q. Did you help her up on her trapeze?

The Court: Help whom?

Mr. Marcus: Miss Cristiani.

A. No, sir.

Q. Did you do anything in connection with her act?

A. Her act took place in the ring which I was in charge of, but her rigging was already set. It was not necessary for me to assist, because the rigging was got out and set already.

Q. You misunderstood the question. I asked if you had anything to do with her act; not the rigging.

A. Not the act.

Q. Did you have anything to do with her performance?

A. Not the performance.

(Testimony of Chandler P. Miller)

Q. Didn't you testify on direct examination that at the beginning of the act you went into the ring of the Cristianis? A. I did not say that.

Q. And during the performance you came back from the Cristianis ring to the other performance ring?

A. I was not in either ring, for that matter.

Q. You were not in the ring where Miss Cristiani was?

A. Neither was I in the ring where Miss Olvera worked.

Q. Didn't you testify on direct examination that you left the ring after Miss Olvera started her performance?

A. The outer part of the ring, between the two rings, [563] was my station.

Q. You just stood there?

A. That was where I could observe both rings.

Q. You did not do anything but observe both rings?

A. Yes.

Q. During the performance? A. Yes.

Q. And that is your testimony now?

A. That is my testimony.

Mr. Marcus: That is all.

Q. By Mr. Combs: Who supervised the guying out of the rigging at the beginning of this particular act?

A. Mr. Pollinger.

Q. By Mr. Marcus: How do you know Mr. Pollinger supervised it? A. I saw him.

Q. What did you see him doing?

A. I saw him assisted by myself and different men with the guy line poles; indicating by his finger, pointing at a certain guy line.

(Testimony of Chandler P. Miller)

Q. He pointed to each guy line, like that (indicating)?

A. He did.

Q. Is that what you call supervising the erection of the rigging?

A. Supervising the guying out of the rigging.

Q. Then I presume, after watching him, standing there [564] between the two rings, you watched the men holding the net?

A. During the guying out of the rigging I was not standing between the two rings. I was behind the rigging.

Q. During the performance of Miss Olvera you did watch the men holding the net?

A. Yes, sir, I did.

Q. Did you see them move?

A. I saw one man move; the man who got hit by Miss Olvera.

Q. Did you see the net move?

A. A portion of the net moved with him.

Q. How far?

A. I couldn't say. That I don't know.

Q. You watched that? A. I did.

Q. How far did she fall from the ring itself?

A. She fell inside the ring.

Q. How far from it, I said.

A. From the inner portion of the ring?

Q. You know where the ring is? A. Yes.

Q. How far from that did she fall?

A. She was inside the ring a couple of feet; maybe three feet. I don't know; approximately that distance.

Q. That is your best estimate at this time?

A. Yes, sir. [565]

Q. How long was that net?

A. About 12 feet long.

(Testimony of Chandler P. Miller)

Q. About 12 feet long? Was it in the very center of the ring? A. Yes, sir, it was.

Q. Then it would be six feet each side of it, wouldn't it, from the center of the ring? A. Yes.

Q. She hit a man coming down? A. Yes.

Q. She fell, as you testified, a foot and a half or two feet from the net? A. Yes, sir.

Q. And you now state that she fell about how far from the ring itself?

A. I would say two feet; maybe three feet. I don't know exactly.

Q. How do you make that distance?

A. The distance from the center of the ring to the edge of the ring is 19 feet 4 inches.

Q. How far did the net go? That was only about six feet, I understood? A. That's right.

Q. She fell how far—about a foot and a half from the net; that would be $7\frac{1}{2}$ feet. $7\frac{1}{2}$ feet of 19 feet is how many feet?—that's about 12 feet, isn't it? Am I correct? [566] A. That's correct.

Q. Then you were just a little bit mistaken?

The Court: Don't answer that.

Q. By Mr. Marcus: Now, can you tell us where she fell, a little bit more accurately?

A. She fell beyond the net about a foot and a half.

Q. I mean from the ring itself.

Mr. Combs: I object to that as already having been asked and answered.

The Court: Sustained.

Mr. Marcus: That is all, Mr. Miller. Thank you.

Mr. Combs: We rest, your Honor.

(The court after admonishing the jury here took a short recess.) [567]

AMERICA OLVERA POLLINGER,

recalled in rebuttal, testified as follows:

(Stipulated that the jurors were present and in the box.)

Direct Examination

Q. By Mr. Marcus: Miss Olvera, I will show you Plaintiff's Exhibit No. 8 for identification, and ask you whether or not that is a fair representation of the main circus tent for the 1937 season?

Mr. Combs: I object to that upon the ground that no proper foundation has been laid.

The Court: Of what circus?

Mr. Marcus: Of the Barnes circus.

Mr. Combs: Same objection. One further comment: This is not a photograph; it is a rotogravure or printing of some sort.

The Court: I think you had better use the word "picture" instead of trying to tell what type of picture it is.

Mr. Marcus: Yes.

Q. Miss Olvera, is that a fair picture of the main Barnes tent for the season of 1937?

Mr. Combs: That is objected to upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation laid; and it calls for the conclusion of the witness.

The Court: Objection overruled. I think first you had better lay the foundation and ask her more about her observation of the outside of the tent. [568]

Q. By Mr. Marcus: Did you ever see the outside of the main circus tent, Miss Olvera? A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. How many times prior to the date of the accident?

A. The Al G. Barnes circus?

Q. Yes.

The Court: That is, during the season of 1937?

Mr. Marcus: Yes.

A. Every day when I came into the show grounds until I got the accident, sir, during the whole season, from March 22nd until September 13th or 12th.

Q. You saw the tent? A. Yes, sir.

Q. Every day? A. Every day, sir.

Q. Tell us whether or not that picture is a fair representation of the outside of the tent.

Mr. Combs: That is objected to as calling for the conclusion of the witness; no proper foundation laid; not a photograph; and there is no evidence here of when it was taken. It calls for the conclusion of the witness.

The Court: Overruled.

A. This is a view of the season 1937.

Q. By Mr. Marcus: Answer yes or no.

A. Yes, sir.

Mr. Marcus: I offer the picture in evidence. [569]

Mr. Combs: I object to the picture being received in evidence as incompetent, irrelevant and immaterial; no proper foundation laid for its introduction in evidence.

The Court: What is the materiality of it?

Mr. Marcus: The materiality of it is to show, in the first place, the bend in the tent, that is, the arch in the tent itself.

The Court: What is the importance of that?

(Testimony of America Olvera Pollinger)

Mr. Marcus: To show that the tent came down to where the trapeze was, so all these things were together up there.

Mr. Combs: I renew my objection to it.

The Court: I think the objection should be sustained.

Q. By Mr. Marcus: Miss Olvera, I will ask you whether or not this picture is a fair representation of the main tent—change that to photograph.

Mr. Combs: Same objection.

The Court: Overruled.

Q. By Mr. Marcus: For 1937, the year 1937.

A. Yes, sir. That is a picture of myself and Miss Jane Withers, the motion picture star.

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial.

Mr. Marcus: It is just for the purpose of identifying the picture, counsel. No other purpose than that.

Mr. Combs: All right.

Mr. Marcus: I ask that this picture be admitted in [570] evidence.

Mr. Combs: I object to it as incompetent, irrelevant and immaterial; no proper foundation laid for its introduction in evidence.

The Court: It does not appear to be material to the court.

Q. By Mr. Marcus: Is that a fair representation of yourself prior to the date of the accident?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Mr. Combs: I object as incompetent, irrelevant and immaterial, and ask that the answer be stricken; it was made while I was objecting.

The Court: What is the purpose of that?

Mr. Marcus: In the first place, your Honor, to show her physical condition at the time; her appearance at the time. Secondly, to show the arch in the tent at the time, by this actual photograph.

Mr. Combs: I object to it on both grounds.

The Court: Sustained.

Q. By Mr. Marcus: Did you have a conversation with Mr. Chandler Miller in Los Angeles, in September of 1939? A. Yes, sir.

Q. Where did that conversation take place?

A. In the back grounds of the circus, right in the property men's wagon.

Q. Who was present at the time you had this conversation? [571]

A. There was Blackie Wallace and another property man, Huey, and Jack.

Q. Jack who?

A. Jack Lysaught, and other riggers; I never knew their names.

Q. What was your conversation at this time with Mr. Chandler Miller?

A. I went to say hello to them; first to Mr. Blackie Wallace. I say "Hello, Blackie"; he say, "Hello, Miss Olvera."

(Testimony of America Olvera Pollinger)

Mr. Combs: May we have just the conversation with Chandler Miller?

Q. By Mr. Marcus: Was this in the presence of Chandler Miller? A. Yes, sir.

Q. Relate the whole thing, please.

A. He told me "We glad to see you." Then Ringling was washing his face.

The Court: When you say Ringling—

A. I beg your pardon. I always knew him as Mr. Ringling. Miller.

Q. By Mr. Marcus: The man who just testified?

A. Yes, the man who just testified; he was washing his face. Then I told Blackie, "You sent me a telegram from New York"—

Mr. Combs: My objection is to a conversation with [572] anybody else. Just the Miller conversation.

The Court: The proper method—I will read this from 180 Cal., 539: "The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer in that the statement was made giving 'the circumstances or times, places and persons present'." [573]

Mr. Marcus: Go back to the question, please, Mr. Reporter, that I asked of Mr. Miller, and read it to this witness.

(Question read by the reporter as follows: "Did you not tell Miss Olvera at that time and place, that you were

(Testimony of America Olvera Pollinger)

working with the Cristianis, assisting them in their act that was being given in the other ring at the same time that Miss Olvera's act was given; that you did not see this act at all, and that you would like to be of assistance to her, and you told her you had sent, with the other riggers, a telegram advising her to this effect, in April, 1939?")

Q. Did you have such a conversation with him?

A. Yes, sir.

The Court: You will have to state the time, place and persons present.

Mr. Marcus: I thought we had given that, but if I haven't, I will ask the question again, your Honor.

Q. Miss Olvera, who was present at that time that you had this conversation with Chandler Miller?

A. There was Blackie Wallace, Huey, Jack Lysaught, and other boys there.

Q. What was the approximate date, to the best of your knowledge, at that time?

A. It was September 12, 1939.

Q. And where did the conversation take place?

A. In the back grounds of the circus at Exposition and [574] Washington Boulevards.

Q. What fixes that date in your mind?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Marcus: Did your husband on this particular date, September 12, go out into the ring before you did?

(Testimony of America Olvera Pollinger)

The Court: You have spoken only of September 12th.

Mr. Marcus: September 12, 1937, the date of the accident.

The Court: Reframe your question.

Q. By Mr. Marcus: Did your husband go out into the ring ahead of you on September 12, 1937?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, and not proper rebuttal; it calls for the conclusion of the witness.

Mr. Marcus: One of the witnesses in the deposition testified that he came out first, and was out there and supervised the erection of that rigging.

The Court: Mr. Marcus, as I recall the testimony, it would not be rebuttal. I think she testified to this on direct examination, did she not?

Mr. Marcus: She so testified, your Honor. I am just rebutting the testimony they introduced.

The Court: It is not necessary to rebut it under such circumstances.

Mr. Marcus: Very well. You may cross examine.
[575]

Mr. Combs: No cross examination.

KARL POLLINGER,

recalled as a witness in rebuttal, testified as follows:

Direct Examination

Q. By Mr. Marcus: Were you present with your wife on September 12, 1939 at Exposition Boulevard?

A. Yes, sir.

Q. At the time she had a conversation with Chandler Miller?

A. Yes, sir.

Mr. Marcus: That is all. You may cross examine.

Mr. Combs: No cross examination.

Mr. Marcus: That is all. We rest, your Honor.

Mr. Combs: The defendants rest.

(The court after admonishing the jury excused them until 1:30 o'clock p. m.)

(Proceedings had without the presence of the jury):

Mr. Combs: I will hand the court a written motion for a directed verdict, and I have an extra copy for the file.

The Court: Let me read the motion. I have read it, Mr. Combs.

(The following is a copy of said written motion for a directed verdict): [576]

In the United States District Court in and for the
Southern District of California
Central Division

No. 8367-B

AMERICA OLVERA, etc.,

Plaintiff,

vs.

AL G. BARNES INC., a corpora-
tion, et al,

Defendants.

MOTION FOR DIRECTED VERDICT.

Come now defendants, by Combs & Murphine, their attorneys, and hereby move the Court to direct a verdict in favor of defendants and against plaintiff herein on the following grounds and for the following reasons:

I.

That the contract sued upon in this case is a contract made under the laws of the State of Florida and contains a clause releasing defendants of any contracting parties from any liability for damages which might have occurred to any participants under the contract, and in this connection further call the Court's attention to the fact that there is no evidence of gross negligence in this case and none has been proven by plaintiff herein, and no facts or circumstances have been shown or proven constituting a release or waiver from the release clause contained in plaintiff's [577] contract, plaintiff's Exhibit No. 1 in this action, and that the same is of binding force and effect upon plaintiff and bars and prohibits her recovery in this action.

II.

Upon the ground that there has been no evidence whatsoever of any kind or nature produced to the effect that Ringling Bros.-Barnum & Bailey Combined Shows, Inc. were the employers or that plaintiff worked for Ringling Bros. at the time the accident in this case occurred, and further that there is no evidence in any way linking or tying up Ringling Bros. to the negligence claimed and alleged in this action by plaintiff herein as having occurred to her on the date of the accident, which occurred at Anthony, Kansas, September 12, 1937, or at all; that there is no evidence whatsoever in this action that Ringling Bros. controlled or regulated the conduct and operation of the Al G. Barnes Show at Anthony, Kansas, on September 12, 1937, or in any manner whatsoever; that there is evidence to the effect that Ringling Bros. and Al G. Barnes are separate corporate entities under separate management and control.

III.

Upon the further grounds that the injuries suffered by the plaintiff in this action were the result, if at all, by the contributory negligence as a matter of law of herself and of her agents, including her husband, Karl Pollinger, in the management, operation, and use of her trapeze equipment. [578]

IV.

That the injury suffered by plaintiff in this action has been conclusively proven and shown to have arisen from the negligence if there was any negligence at all, of fellow servants of plaintiff engaged in the production of an enterprise on behalf of defendant Al G. Barnes Show, together with the fact that plaintiff was an independent contractor,

does not relieve her from the law of Kansas providing that her employer is not liable for injuries occurring to her through the negligent act of her fellow servants.

V.

That the injuries in this matter were the result of a course of action adopted by plaintiff with full knowledge of the nature and character of her act and by her as an experienced, mature person cognizant thereof and of the risks and hazards in connection therewith, and that she assumed all the risks and hazards of her employment. In this connection :

(a) That she assumed the risks and hazards of her employment and her act as a trapeze artist in general;

(b) That if there are any general risks occurring as the result of the operation and management of her equipment by the defendants, she assumed the risk and hazard of such additional risks, if any there were, and knew about them and in that connection she knew about the risks and hazards of falling beyond a net used and employed and held directly [579] under her trapeze for the purpose of catching her in the event she fell, if such were the fact.

(c) That the claim is barred by the statute of limitations.

(d) No gross negligence and no wanton or willful misconduct has been proven and the contract releases defendants of any liability.

We respectfully urge the Court that on each and all of the foregoing grounds the Court should direct a verdict in favor of defendants in this action.

COMBS & MURPHINE,

By Lee Combs,

Attorneys for Defendants.

Mr. Combs: By way of supplement—and I will ask the reporter to take all this, although some of it appears to be argument, because it contains grounds of motion—by way of supplement of the written motion which I understand the court to have read, I would add that in this case there can be no question but what the absolute minimum requirement on the part of plaintiff to prove in order to establish a case of liability against the defendants, or either of them, is gross negligence.

The evidence shows—I am summarizing very briefly, because I believe the court is familiar with the evidence, and I don't want to take up any more time than is necessary—[580] that the negligence claimed, or complained of, could have occurred only in two spots: The management and operation of the net, and the erection of the trapeze. On the subject of both of these matters the evidence is uncontradicted to the effect that both were conducted and handled in the same manner that they had been handled all season, and that there had been nothing unsatisfactory about the manner in which either of these items had been handled prior to the afternoon of the day of Miss Olvera's fall. The testimony being thus it is evident that these defendants conducted themselves in a manner which business men would logically and intelligently conduct themselves in connection with a matter involving the due course of their business. For a charge to be made on the basis of that factual background, that in this particular case they were guilty of gross negligence, we think to be so untenable as to constitute a fantasy.

I won't go into improbabilities; I won't even say possibilities, as a mathematical calculation of this accident to have occurred, as Miss Olvera claims it did. I think that is so conclusive that in itself it warrants a directed verdict.

In connection with the last point in my memorandum, I will comment that there would have to be a wanton or willful disregard of the rights of this plaintiff, or the safety of her welfare, to entitle any recovery. In my opinion, however, in a case of this nature, gross negligence, to be [581] gross negligence, would have to be a willful and intentional deliberate, wrongful act, and an act which was so shamefully wrong on the face of it that it would constitute that.

We respectfully submit this case falls so far short of any such act that, in our judgment, there can be no doubt, in a reasonable mind, as to the course of conduct. We don't believe there is any negligence at all established in this case, much less gross negligence. Certainly not gross negligence. The contract itself is a valid, binding, enforceable contract, your Honor. It provides certain specific things, among which, she assumes the risks and hazards, and she contracts away the defendants' liability for negligent acts.

She knew the nature of the occupation she was undertaking, and had engaged in it for a great many years, and it was her responsibility, not the defendants. Naturally, we regret she had an accident, but, unfortunately, our stockholders and our due management require, just because a person has an accident, we do not pay out large sums from the company's coffers. It would not be just or right to do that. Therefore, in this case, because she has no legal right, we respectfully submit the motion for a directed verdict should be granted on all the grounds stated in the motion, and on the additional grounds stated in this oral argument.

I don't believe it will be necessary, if your Honor is agreeable, and counsel is agreeable, for me to read all of

[582] this written motion, if it may be stipulated to be deemed read.

The Court: It may be filed.

Mr. Combs: All right, we will file it.

Mr. Marcus: I am not going to take very much time to reply to counsel. Counsel at the beginning of his dissertation advised your Honor there was no contradiction as to the effect that the rigging had always been erected satisfactorily, and that there had been no difficulty prior to the time Miss Olvera was injured, on September 12, 1937.

I don't know whether counsel purposely forgets these things, or whether it is just done in the heat of discussion; but I wonder if he remembers the time Mr. Pollinger testified to the instance when the stake in the ground came out, and he advised them at the time that the rigging had not been set up properly, and the guy ropes had not been set up properly. Miss Olvera testified that on three different occasions she had to come down off of the trapeze because it was not set up properly; that the lines were crossed. Do you remember that now, Mr. Combs?

Mr. Combs: No, I don't.

Mr. Marcus: Look at the transcript. Counsel says there is no legal right for her claim of action, because there is no basis established by the evidence, or otherwise, that they were guilty of gross negligence. Well, apparently counsel does not agree with two judges of the Ninth Circuit. [583] They said there was evidence from which the jury might infer, and could infer, that the defendants were guilty of gross negligence; and I believe, at least so far as this case is concerned, that the law has been established, and that we are bound to follow that law.

Counsel says there is no negligence at all, in his opinion: that Miss Olvera assumed the risks and hazards of the

employment. Sure she did, but she certainly did not assume the risks and hazards of the gross negligence of the employees of the circus.

The testimony at this time, your Honor, certainly is not a fantasy, as counsel calls it. This woman, walking around on crutches for the past seven years, and probably the rest of her life, is not going through a fantasy, and her claim is predicated upon a legal right, a right that has been established by law now as the law of this case; that if this jury should believe that the employees of the circus, in the erection and maintenance of that rigging, and in the operation of that net, were grossly negligent—and I can't see how they can possibly come to any other conclusion, because to see something, and to fail to do something under those circumstances that call for the utmost degree of cooperation, the utmost degree of care,—and to fail to do something under those circumstances, where a person's life is at stake, and they knowing that the net is there for the purpose of catching her in safety when she fell, and they [584] failed to move, to my mind that even goes further than gross negligence. It means they willfully disregarded the safety and the life of another, because her life was in danger if she fell.

I say there is no merit to this motion to dismiss at this time, your Honor. We are here to adjudicate her legal rights. It is no fantasy. I respectfully submit that this motion should be denied.

Mr. Combs: No further argument, your Honor.

The Court: The motion will be denied. The court will recess until 1:30.

(Whereupon a recess was taken until 1:30 o'clock p. m. of the same day.) [585]

AFTERNOON SESSION
1:30 o'CLOCK.

The Court: I think I may state that the attorneys representing the parties have agreed informally that that part of Rule 51 which states that the court shall inform counsel of his proposed action upon requests prior to the arguments to the jury, will be waived, and that the parties may make their objections to the instructions after the jury has been instructed and retires, and that it shall be deemed that such objections were made before the arguments.

Mr. Combs: We so stipulate.

Mr. Marcus: That's right.

The Court: That is what you did before.

Mr. Combs: Yes. I suppose that will include the refusal to give requested instructions, as well as the giving of the actual instructions.

The Court: You may include anything you want.

Mr. Combs: May it be stipulated that Defendants' Exhibit B, which is the blackboard, be received in evidence, however, with the proviso that a photographic copy may be substituted in lieu of the blackboard itself, as soon as that has been completed by the photographer.

Mr. Marcus: So stipulated.

The Court: You agree that the arguments may be limited to one hour on each side? [586]

Mr. Marcus: So stipulated.

Mr. Combs: Yes.

The Court: The members of the jury are all present, so stipulated?

Mr. Combs: So stipulated.

Mr. Marcus: So stipulated, your Honor. [587]

ARGUMENT BY MR. MARCUS

Mr. Marcus: Gentlemen of the jury; I don't think it is fitting or proper for me at this time, in the light of the evidence, to unduly trespass upon your time at this stage of the proceedings. I am going to attempt in this argument to give a very brief review of the evidence, and will attempt to do so in a most fair and impartial manner. It is counsel's duty, as an attorney and as a member of the bar, to assist the jury in arriving at a fair and impartial verdict. Argument by counsel, no matter how convincing or able it may be, whether it come from counsel advocating the cause of the plaintiff in this matter, or whether it comes from most able counsel representing the defendants in this case, is not evidence in the case. We must approach a discussion of this evidence viewed in the light as we have heard it from the witnesses who have testified in this case, because the jurors who have been called upon to decide the facts in this case are the ones to pass upon the evidence introduced in this trial. That is not a province of the court; it is not a province of counsel, but it is a God-given right as free Americans to have a jury pass upon the facts.

Now, in approaching a discussion of this evidence the jurors are the ones who pass upon the weight and credibility of the witnesses who have testified in the case. That is your province; your duty; and your right. You have heard [588] the witnesses who have testified here. You observed their conduct on the witness stand. It is your duty, in passing upon the weight of their testimony, upon their credibility as witnesses, to examine their testimony, to watch their demeanor on the witness stand; whether they were willing witnesses; whether they were reticent about their answers; whether they volunteered their state-

ments; whether they propounded more than they actually knew. Those are things that are exclusively the province of this jury; and if you believe—and the court, I believe, will so instruct you—that if a witness has willfully sworn falsely to one material fact you can disregard all of that witness' testimony.

In the light of these preliminary remarks I am going, not to approach our side of the case, because you have heard most of our witnesses here; you have observed their conduct on the witness stand, and I presume that you are able to pass upon their credibility very easily.

I will start in first with the testimony of that most gracious witness, Mr. Chandler Miller. He is a man that came here from New York, brought here presumably by the circus to testify in this case; a man who happened to know, or happened to remember, everything in detail—and I mean in detail—that happened approximately seven years ago. But listen to this: Evidently he must have discussed this case with someone; evidently he must have had his memory refreshed, or at least you may, by reasonable inference, deduce that his memory was refreshed by someone; but he only [589] remembered as to the details of the accident; only with reference to the details concerning how the accident happened. That he remembered in the minutest detail. But knowing these witnesses sometimes, in the light of cross examination, can oftentimes display their true intentions, in their true light, their bias and their prejudice, under the searching light at least of cross-examination, that is given to us under the law,—to me it was most significant that he can remember everything; the hour; the manner; the minutest details; but when he is asked: Mr. Miller, what town did this happen in? He could not even tell you that. Certainly that would

the most benefit to those by whom he could benefit from, he would have remembered above all,—is where the accident happened. That would have been more important, more significant, than to remember that there were six wires, or eight wires, or twelve wires, and so forth.

Do you know where you were the day before? Do you know where you were the day afterwards? And what was his answer? I don't remember. That is most significant. It illustrates quite vividly that he was attempting to be of the most benefit to those by whom he could benefit from, and certainly it was not Miss Olvera. It was the circus that brought him here from New York and placed him on the witness stand to testify in their behalf. When he got down off the witness stand, and he began to draw these drawings you noted his fairness in the matter, and his unprejudice in the matter. [590] Oh, he was a swell witness, and an intelligent one to start, until he was confronted and carried to the extent that he could not get out of some of these things. He was brought down here, and he made a drawing over here. He could see everything that was up there, that was 45 or 50 feet up in the air—anyway, 42 feet in the air, and he would lead the jury to believe that he could see those things up there, because what was there was only a trapeze. That was not being fair to Miss Olvera. A witness has got to be fair to both sides, and if there is any failure to disclose what was within his knowledge, or failure to produce the evidence which was within their knowledge, certainly they have, to my mind, at least failed to do their duty both to the plaintiff and to the defendants, because they harm their own case by that conduct.

When he was called down here he was asked if that was a fair representation of the conditions existing within that

ring and within that tent at the particular time and place, and he said yes. Now, that was not true. Then he was brought down and asked to put in the other trapeze. He was reluctant to do these things. Do you remember, when he went to discuss the matter of these ropes up here, how many times he had to be asked the question, and finally he admitted that there were many ropes up there in addition to them, approximately ten more ropes up there, which held the tent up on the inside, and then would go out to the outer end of it, but [591] he attempted to tell you that the conditions that he said existed there, and the reasons why he could tell you what the conditions were at the time was because it would appear there was only one little trapeze up there, and for that reason he could see it all. But when you put in all the rest of these wires, the trapeze, the blocks and tackles, and ropes, and guy lines, it doesn't become so easy after all. Finally he said he couldn't possibly put in the ropes that belonged there. That is just one illustration of one of their witnesses. Let us go on to another one.

There were several depositions read to you from witnesses who were back east, three of them, if I remember correctly. I am going to designate those gentlemen as the three wise men from the east, because they saw and heard all, and knew all. You know, there is an engraving across the front of our Hall of Justice, not very many feet from this building, which says that he who violates his oath desecrates the divinity of truth itself.

Now, how apropos is that to this case. These depositions are in evidence here, the originals of them. We read them out of the transcript. Gentlemen, it would have to be an insult to your intelligence to believe that a man would take a witness stand—and that, after all, is what

these witnesses did, although their depositions were taken—would sit there on the witness stand, under oath, and recite for a page and a half, and to the minutest detail, the rigging, the [592] apparatus and size of it, without a grammatical mistake. Not once. Why, it became so obvious it was ridiculous to hear the wording of those depositions. I only wish they were brought here, so that we could have had at least some opportunity to examine them on the witness stand. I would like to know what these witnesses would have said, if they were asked these questions, because you know, when the depositions were taken in New York, counsel was not present. They were submitted upon written interrogatories. That is, the questions are written down, sent back there, and they have an opportunity of going through them and answering them, without the presence, as was the case in this matter, of the plaintiff being represented by counsel. And we would have liked, under the circumstances, to have had the witness here, and to have asked him this question: How is it that some four or five different times in this deposition you testified word for word, line for line, paragraph for paragraph, and dimension for dimension, for over a page and a half of your deposition? Doesn't that seem **obvious**? What conclusion can any reasonable or intelligent man come to but that that man violated his oath, when he took his oath to tell the truth in the case? Certainly, by no stretch of the imagination, could he have sat there and for a page and a half answered a question as he did. If there is any doubt in your minds about it, you will read it from the record.

Then another one of these witnesses, one of these men [593] from the east, he also said: I supervised the erection—and then it went on identically, answering in the

minutest detail question after question, and not one grammatical mistake. How do you account for that? There is only one way to account for it, and I will leave it to you jurors to determine that. Certainly nobody is going to answer the questions that way. Was the defense truthful? Was the defense honest?

Mr. George Williamson, one of the witnesses whose deposition was read, said what? Chandler Miller handled the rigging. Mr. Miller, when asked that, said: I didn't handle the rigging. Mr. George Williamson said: I supervised the erection of the rigging in the morning. In the afternoon, Mr. Miller said: I supervised the erection and inspection of the rigging in the morning. Do you remember how many times I read it out of his deposition? Seven different times, until I was stopped by the court; and there was some more on top of it. Now, what does Mr. Howard Mentz say—the one, you will remember, whose deposition was read; the one who had a broken leg. He said he had a broken leg, and he was not there at the time. He gave a minute description of the apparatus, of how the act was performed, and what was done with Miss Olvera later in the proceedings; and he ends up by saying that he tried to do everything possible for her, but it was useless, so he went home. There is so much discrepancy in these depositions [594] that it would be useless to attempt to reconcile them. It is obviously an out and out violation of their oaths.

Let us get down to the direct facts in this case. What are we predicating our case upon? What has happened here? Here is a lady in the prime of life, who went to work for the largest circus in the world, she being the feature attraction for this company, this company which had waxed rich and powerful and mighty upon the performances and ability of people like Miss America Olvera.

Mr. Combs: We respectfully submit that is a prejudicial, unfair and unjust comment, that this corporation waxes rich on the exploitation of performers.

Mr. Marcus: I did not say "exploitation."

The Court: Read it.

(Record read by the reporter.)

The Court: I think that is inappropriate. Motion granted.

Mr. Combs: May the jury be instructed to disregard it?

The Court: The jury is instructed to disregard that statement.

Mr. Marcus: Here was a contract given to her on the 24th of September, 1936. I have got the exhibit in my hand. You see it is printed. This is a printed contract that was given to her by Ringling Bros. Barnum & Bailey Combined Shows. This is one of those contracts, that you can take it or leave it. Miss Olvera agreed to go to work for them under this contract for the sum of \$80.00 per week. In addition to that [595] she was to get her lodging, her transportation and food.

They attempted by this agreement to release themselves from all responsibility, be it for their negligence, gross negligence or willful misconduct, whatever you want, but, fortunately, that is not the law of this State, that a corporation can release themselves from their own gross negligence. Not yet; even though they attempted to do it. You can see by reading this contract how favorable this was to the defendants in this case, and how unfavorable it was to the person who undertakes to render services **under it**. It's furnished to them; it's given to them, and they are told to put their signature to it, and that's that.

Now, what do we have here? We have a situation where the circus, through its employees, erected the rigging; something went wrong with it; Miss Olvera was thrown from the trapeze. Now, the most important part I think about this matter is, how she fell. What was the cause of the fall is something of not particular importance; but the importance is this: They provided a net for her. That net was held by the employees of the circus. What was the purpose of the net? I believe the court asked that of the witness Miller: What was the purpose of that net? Was it to catch her in safety?—Yes. Now, was that done in this case? No. Did any of the witnesses testify that the net was moved or attempted to be moved in any particular? Only Mr. Miller. He said the man who got hurt moved about a foot. [596] Well, I guess he tried to get out of the way. That's the reason for his moving. It was a good thing she did not strike somebody else. The rest of them might have moved at least; but can you imagine—every witness testified she fell from a foot and a half to two feet of the net, and they weren't even in a position, they weren't even in that situation where they could have moved just a little foot, and have saved this woman a lifetime of misery.

After all, if that isn't gross negligence, there isn't a case of gross negligence that I ever heard of. After all, gentlemen, as the court will instruct you as a matter of law, negligence is a relative term. What might be negligence in one instance would not be negligence in another instance, because negligence, or gross negligence, as the case may be, is dependent upon time, place and circumstances. Where the danger to be avoided is great, then the care to be exercised is correspondingly great. Here this lady was performing upon a trapeze. She was flying

up in the air, so that a slip, or some maladjustment or some difficulty with the trapeze would mean possibly her life. Then the danger involved was great, and the corresponding duty would have to be great; and in order to constitute gross negligence in that particular instance is a lot different than negligence or gross negligence in another instance, where a person's life is not at stake, or where the great danger to be avoided is not as serious, or as difficult as it is in this particular case. [597]

I believe that Mr. Cronin was a very honest witness. Do you remember his saying that they have so much difficulty with their prop men and riggers, and men employed as laborers; they come and go all the time, and I believe you gentlemen remember that. But what do we have? We have the testimony of Mr. Williamson, the supervisor. He said he had a most excellent crew, who had been with him for a long time. He was not with the circus any more. Mr. Cronin is not there any more. That's why I think you got the truth from this man. One was a person who, at the time his deposition was taken, was in their employ, working for them at the time.

Mr. Combs: Excuse me for another interruption. The statement made by counsel is untrue. Williamson was not in the employ of the company at the time he gave his deposition. The deposition so shows. I regret the interruption. I request that the jury be instructed to disregard that.

Mr. Marcus: If he was not employed, I will withdraw it with respect to that.

The Court: The jurors will be instructed not to consider it.

Mr. Marcus: Now, gentlemen, I only have a few minutes time on the matter of this argument. Here is a lady that has given the best part of her life to the rendition of her services for this company. I don't know whether any of you gentlemen have appeared in public. I don't know what your experience has been in so far as trying to please the public. [598] But I will venture to say that you know that if you die in the end it's not appreciated. You give the best that's in you. You give your life, or your services, and what do you get in the end? Probably just an empty life.

What happened in this case? The evidence is uncontradicted that this lady worked from the year 1933, through part of the season of 1937, until she was injured, rendering her services under the Ringling contract, for a show which they placed her in. She suffered a most serious injury; something that took away from her for the rest of her life the ability to do that for which she had been trained from childhood. Then after getting out of the hospital, you can imagine what effort she made, with a broken back, lying on splints, in agony and pain, traveling about with that circus.

You will remember Dr. Hugo Kersten—by the way, he was called by the defendants to examine her. He did not have an opportunity of examining these X-rays until he came to court, to express an opinion, until such examination was made. He examined these X-rays while he was on the witness stand. What did he say about her condi-

tion? I could not have gotten a better witness if I had called him myself. He gave a true picture of the woman's condition. She will never be able to work in the circus again, or do her act again. But what happened when she went to ask Mr. Pat Valdo, and walked in on her crutches? She was broken in body, and probably in spirit. If not then, surely now. What happened? [599] Do you want any money? If you do you work for it. Well, work how? Did they provide her with at least medical attention? Did they give her the means or ability to go out and get this money? No, they didn't. It was rather amusing when counsel was examining Dr. Kersten. He said: Supposing this operation had been done before? And do you know what that operation meant? Opening up the back, taking the spine and cutting part of the crushed vertebrae in an attempt to fuse them one to another; being in the hospital for months and months. It takes an expert to do a thing like that, and they don't do these operations for buttons or chalk, yet, that I know of.

She traveled around with that circus all the time. Was any effort made by them to assist her, so that she could get these things? You can answer that, if you want to. They said: You will have to work for it. And that's what happened in this case.

Gentlemen, you have probably reached the conclusion that there was a previous trial in this case; and there was. It's in the record. And there is another trial now; and don't you think we don't have to do everything in our power, our legal power, to convince this circus here that

they ought to take care of people who have rendered their services to them, and have given of their life. At least, so far as this little lady is concerned, she has given everything that is dear to her, and these people say they don't have to be [600] responsible for her condition.

Now, I say to Miss America Olvera, that I think these men on the jury realize your condition. I think they know what you have gone through for the past seven years, and I know, and I feel down in my heart, that this jury will not let her down. She has asked here for \$50,000. That is the amount of the prayer. She was earning \$80 per week, and in addition to that she was given her lodging; she was given her transportation. In addition to that, during the summer months when she was not employed by the circus, she earned other sums working all over Europe, all over Mexico. She was a premiere performer of the world. Conservatively speaking, her income was at least \$100 a week. That's \$400 a month. That's \$4800 a year. It has been seven years since she has done any work, approximately. Those are her special damages. If she is entitled to a dime she is entitled to that.

In addition to that the court will instruct you that she is entitled to be paid for her pain and suffering in dollars and cents. I don't think that the prayer for \$50,000, in this case, is excessive at all in the light of these circumstances.

Gentlemen of the jury, you have been very patient and very kind to me. I hope you will be kind to my client.
[601]

ARGUMENT BY MR. COMBS

Mr. Combs: I don't feel that I stand here in a position of an individual representing several other individuals, in which position I should be subjected to excoriating criticisms on various matters totally disconnected, gentlemen of the jury, with the facts and the law in this case. Therefore, with the utmost sincerity, gentlemen of the jury, I approach this argument, particularly in the light of the opening argument, with a sense perhaps of outraged dignity.

Counsel opened his argument with a tirade against witnesses, and I might add in this case only three or four were selected out of a group of more than twice that number. When you gentlemen undertook the responsibility of deciding this case, which you undertook as fine citizens, you did so with the assurance, and with your avowed and determined intention to do exactly that, that this case would be decided without the influence of emotion or emotional factors. Let me say, gentlemen of the jury, you are to remember in this connection you are dealing with two—the plaintiff and the plaintiff's husband—clever actors; actors who were able to hold spellbound a tent of ten thousand people or more, in their performances. Don't think they are not asserting and using and exercising that peculiar ability of theirs to the extreme in this case. I ask your indulgence for these men, who less capable and able along the [602] same lines, are only able to present my client's cause in a humdrum manner; yet they have presented it true and fair and fine. Be fair, gentlemen of the jury; then decide the case on the evidence and the law as I know you will.

Briefly, on the subject of damages, there is a slight perversion of the testimony of Dr. Kersten. What Dr. Ker-

sten said was, had this woman been placed in a proper cast—and I know that cast, for I have seen it in my own family, where two or three of the vertebrae of the back were crushed, they have been completely mended—but she elected of her own motion—you will remember that question on that subject—to return to the circus to follow the glamour of the circus.

I admit they love the circus business, because it is glamorous, and they love the applause they receive, and there were other reasons she elected to return to the circus. It was not a responsibility of ours to do this, but if it were our responsibility, let me assure you gentlemen of the jury, that this gentleman representing Miss Olvera would have been the first to say so. In other words, the argument would have been exactly the reverse; we would have been damned for doing what we are attempted to be damned for not doing.

That brings me to counsel's comment respecting the evidence of several deposition witnesses for the defendants. First, he made another error, which I did not cite at the time, stating there were three depositions read. There were [603] only two. The third one was here, and was caled, and that was Chandler Miller. Counsel had his deposition before him, with 100 questions, and he unsuccessfully endeavored to impeach his testimony. Let me ask you, gentlemen, how well that man told the truth in 1940, in relating events which occurred a couple of years before he gave his deposition, how much more difficult was it for him to testify, relating the events in person on the witness stand, under those trying circumstances, knowing counsel had the transcript before him, eager to grab any chance to impeach the integrity of his words—as to whether that man told the truth, I will let you be the judges.

In that same vein counsel charges these witnesses with having given identical answers to questions, and then shifts over rapidly and charges them with inconsistencies and irregularities, and he made the charge against these honorable men, entirely unsupported by any evidence, that they deliberately committed the crime of perjury, and falsely testified under oath; and in support of his contention he cited the beautiful motto that graces our Hall of Justice. I am happy to say, in the course of my argument, I am never going to say that any person took the stand and deliberately told an untruth. I will point out inconsistencies, but I will never charge a person with having committed such a crime so glibly.

Naturally, rigging men would know rigging, would know [604] every eye, block or tackle, would know them a lot better than they would know the towns they went through. So far as Chandler Miller is concerned, he was asked questions spontaneously, and could not have prepared any dimensions of the tent, and other dimensions. Counsel tried bitterly and hard to break that witness' testimony. He never affected its integrity, its truth or veracity; and if we had no other witness than his own testimony, it would be convincing; but we do have some six or eight others. I will ask you if anyone could ever charge Chandler Miller with being suave. If ever a man was not suave, there was one. I don't know of anybody around the circus who is suave, unless it be the performers, or unless it be the one who barks out in front, commonly called a barker. Sometimes he is suave. Chandler Miller was not suave. Counsel says he is biased. His bias, I take it, consists of the fact that he was a responsible enough citizen to do approximately what you gentlemen are doing here today. You have devoted very

largely of your time. He has devoted of his business. He had to come from New Jersey. Every person is happy to discharge his duty, whether as a juror or as a witness. That is what Chandler Miller did. He is not employed now by the circus. He has not been for a long time.

I might say this contract, gentlemen of the jury—the contract in this case, defines the relations and the rights of the parties, and it has been so held, and I believe the [605] court will instruct you, that this contract is a valid, binding, enforceable contract. The parties had a right to such a contract, and they did so in the due course of their business, both of them knowing all the phases of their business that required attention. Neither party had to sign the contract. It was of their own free will and volition, and it was done with a consideration, and the terms and conditions of that contract clarify and conclusively establish the relations of the parties in this case. I might add, gentlemen of the jury, when you get to the jury room you may take that contract with you, if you please, as well as all the exhibits; and I know a study of it will give you an answer to this case. It will give you an answer to this case, gentlemen of the jury. I want to read a few portions of it. Clause 8:

“The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the ‘act’ by reason of the Artist’s skill constitutes a ‘feature’ performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act.

“* * * The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe.”

Let me call your attention in that connection, gentlemen [606] of the jury, that the testimony regarding Pollinger himself, the testimony of not one, but several reputable, unimpeached witnesses in this case, including Miller, who was here before us, was to the effect that Pollinger supervised the guying out of that rigging on the very day of the accident. I noticed that counsel did not touch on that in his opening argument; that the so-called tangled-up 8-hook—I presume he will return to that subject, I now having brought it up, in his reply argument; but on the subject of the rigging itself, the testimony to our mind, by the unbiased witnesses in this case, is unimpeached, to the effect that Pollinger supervised the erection of that rigging on that day, just exactly as Miss Olvera's contract provided, and just as he did in the due management of this business, in the due course of the business, over these months from March until the time of this accident. I will come back to the subject of that so-called tangled-up condition of the guy wires, or rather of the falls and the 8-hooks, in a minute. I want now, however, to read another portion of the contract, while we are on it, and I will try to deal with all the parts of the contract at one time, that I intend to mention.

“That the Artist in accepting from the Show meals, car-lodgings and transportation on its circus train, receives special benefits of recognized value to the Artist, and that such special benefits constitute consideration to the Artist for his release for claim for damage of every nature and [607] description that he may have during or after the period of performance, under this contract, against all transporting railroads and the Show.”

The Show being the defendants in this case.

"Now, therefore, for valuable consideration the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants, and any transporting railroad company handling the Show's circus train movements, of and from all claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the persons and/or property of the Artist in any transaction whatsoever during period of performance under this contract; and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract."

Gentlemen, the law of this case, as the court will give it to you, is that there cannot be any recovery in this case if the defendants were only negligent. It would have to be a gross negligence, and that means, gentlemen of the jury, just what it says. It means something far beyond ordinary negligence of the house and garden variety that we hear of from day to day, such as that where automobiles have a collision. This must be gross negligence, and gross negligence means simply this: That there must have been a [608] disregard for the rights of others, a conscious doing of a thing, or failing to do a thing, that could not have but one result; something tantamount to willful, deliberate or intentional wrong to another. That is what that means.

Can you find a single thing in the testimony in this record indicating any such attitude or conduct on the part of these people? There isn't one single one of these riggers that would not have broken his neck to catch Olvera, if he could. The very fallacy in that regard ap-

pears from the fact that counsel argues that this man who was hit must have tried to get out of the way. I guess he did, but he couldn't make it. Isn't that the answer? But back to the subject of gross negligence. These people did not do anything like that for this woman. They did not want to hurt her, nor did they omit doing things, in an intentional manner, that would tend to bring about such result. Indeed not. Quite to the contrary. If there were any responsibility for their checking up the equipment in connection with the figure 8 hook situation, it was in the light of the fact that Pollinger was the man who did it. He saw the last set-up, and failed to see if anything was wrong. I don't believe there was anything wrong with it, gentlemen of the jury.

There wasn't even ordinary negligence. And Mrs. Pollinger, the plaintiff, in response to a question on direct examination, whether or not the apparatus was located [609] in exactly the same manner at Anthony, Kansas, as on the six months preceding the 12th of September, when the show was being put on, she said yes. Likewise, a similar question respecting the net, and a similar answer. Can you gather any inference of gross negligence from that? You can't gather any inference of negligence. The fact that she fell on the 12th of September did not alter the fact that the show company operated in a legitimate and lawful manner, free entirely from anything that could be claimed as gross negligence; in fact, free from any negligence at all.

Miss Olvera, when she undertook her contract with these show people, was very familiar with the whole business. She knew all of the risks, dangers, and hazards; and they would not have wanted a single performer, for any of their shows, who did not have such a contract.

That was the whole matter; the whole situation, and these gentlemen, in operating their business, with those hazards, gentlemen of the jury, multiplied by better than a hundred times, involving the number of performers they had, could not possibly make a contract other than like the one they had here. They would be out of business before they were in. Two or three accidents would lick them.

The performer comes to the employer and says: I want this job, and I am good at it. The employer says back: Will you take all the risks? We can't afford to take you [610] unless you do. It would lick us in to time, unless you did. She says: Yes, I will, and she signs the contract. Aside from the resume I have just made, of what is the custom or manner of conducting that business, she goes further and recites: "That the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract."

Gentlemen of the jury, remember this is not a master and servant case. This woman was an independent contractor, and that, under the law, implies that she had full control and direction of the means and manner of operating her act. We have no right to step in and say: You do this, that, and the other thing. This is different than in the case of a master and servant. We have no direction or control over her, to tell her that at a certain point she should put her hands out one way or another way. That was entirely hers; and she was mighty clever at it, too. The show did not take any responsibility other than that described in this sacred document, that is the basis of the relationship of the parties. It could not be otherwise. The law so recognizes it, and the court will instruct you on that subject.

An independent contractee only owes that duty to the independent contractor to refrain from occasioning some defect that is known to him or it, that is not known to the independent contractor. That is the extent of the duty. [611] There was not a single thing we knew about. She wanted to use the net she asked for; that was the net she used for months, in exactly the manner she directed. What else could we have done? Not a single thing, gentlemen of the jury.

We have not been guilty of any negligence, much less that kind of negligence; and to place the finger of shame on us gross misconduct so bad that it was flagrant, or something more or less disgraceful—there was nothing of that kind. We acted at all times during this entire season, and during the afternoon in question in this matter, as an ordinarily reasonable, prudent business man would operate in operating that kind of a show. The best indication of that is the fact that the Barnes circus is one of the big circuses of this country, enjoying an important part in the history of this country; a show business headed by honorable men, not to be shamed and disgraced by suddenly being informed that they grossly and negligently conducted their business, which they had been conducting for 50 or 75 years. I claim it is not fair; it is not just; it is not right; it is not true.

Regarding the figure 8 hook situation, we sincerely submit to you gentlemen that Miss Olvera is mistaken as to what she saw when she looked up. She is the only witness in the entire case who has testified positively as to what happened, and she did so at the very instant she claims to have taken in this picture—at the very instant when she was faced with a prospect, in fact, the reality of a fall, [612] because it was at the instant she says she looked

up to get a fixed point on the crane bar she saw the hook, tangled up by the clevis and the figure 8 hook, and at that instant it came down, and she fell.

Let us look at that situation, and I submit, gentlemen of the jury, that you consider your knowledge of elementary physics in considering this point. This figure 8 hook at the left, as we face Defendants' Exhibit B, is claimed to have been tangled up. That raised the line approximately two inches, according to the testimony, the line that fell down to the trapeze bar. Miss Olvera and Pollinger were positive on the subject that the trapeze bar was level. I believe the reason that it was level was because it was not tangled up. But it was level, according to plaintiff's theory, and, of course, if it had not been level she could not have performed at all, and right at the time she stepped on it, she would have noticed it. So it had to be level.

If you raise that two inches, that makes this right hand line 12 feet, and this 11 feet 10 inches, approximately. You have got to compensate for that; otherwise this bar would not be level down here. The testimony is positive on that subject. So you have to get the crane bar slightly on a level; but which side, gentlemen of the jury, has to come down in order to accomplish that adjustment? It can't be this side; it will have to be the other side, because you have to take up two extra inches on the right hand side. That [613] is the extra length. If you lower this corner you will only accentuate the difficulty, and make it worse. What she contends is—you remember her gesture on the witness stand, she says the clevis caught in some place here, indicated in general by the position of my left hand, the wrist straight, and when it fell the clevis clicked down in there.

Gentlemen of the jury, if that clevis had been in that position, it would only have made the situation worse, because it would have lowered the left side of the crane bar again, rather than the right side, so it would have had that much additional shortness in this side, in the left side. That could not have happened. They adjusted that, or attempted to adjust it, by claiming that that was compensated for by the guy lines; that the testimony of Mr. Miller is clear on the subject, that it could never have done so; in fact, he said if you pulled the guy lines, if the clevis had been fastened up, it would have pulled it back into place. It would have. She was mistaken, gentlemen of the jury; she was mistaken in the frenzy of a moment of desperation. She knew she was about to fall. That's what happened in regard to that.

Let me point out, in addition to that, to corroborate that fact, how could that trapeze bar have swung through two and one-half minutes of the act, in which she swung out to the right and left sideways, and swung backwards and forwards? She whirled the trapeze around until it wound up [614] behind her, and unwound. Certainly that motion would have unloosened any kind of a tangled up condition of the hooks. It just wouldn't have remained in that position. Even if it had been in that position, gentlemen, it would not have been gross negligence. It would have been negligence on the part of Mr. Pollinger, in leveling off the equipment. He would have seen the defect himself. He was the man who last inspected it.

We have testimony, and we have positive evidence on that subject, by six men, all unbiased witnesses. Gentlemen of the jury, not one of those men is presently employed by either of the defendants, and only one of them who has been employed, to-wit, Chandler Miller, within

the last seven years, because La Bay, Williamson, Matlock, Mentz and Thornton, those five individuals, at the time this accident occurred, were serving their last employment for either of the defendants in this case. Without exception these men said the trapeze was O.K.; was in its right condition, good condition, exactly as it always had been there. The testimony they have given lends credence to their story, because we know humans fail in small details; but the general picture is infallibly clear and uncontradicted in this case respecting that phase. And I notice counsel left it out in his opening argument. I must infer from that that either he considered it too weak for his argument to be sustained, or that he hoped to box my ears with it, shall we [615] say, when the closing argument is made, when I have no opportunity to reply to it and analyze that point.

Gentlemen of the jury, consider it in the light of the examination of the equipment, of the physical facts, of the impossibilities, of the total impossibilities, certainly improbabilities; then weigh it in the light of the gross negligence rule. You will find you have got nothing left, gentlemen of the jury, upon which to predicate liability against these defendants on that subject.

If there was something wrong with either the trapeze or the net, particularly the trapeze, in this connection, it would have been negligence on the part of Mr. Pollinger not to have seen it; then it would have contributed to the result obtained in this case, and would have prohibited plaintiff from recovery, because you must bear in mind, if there is any negligence, no matter how slight, on the part of plaintiff, that contributed in any way, as a proximate cause of the accident, plaintiff may not recover. Remember the rule, no matter how slight; if there is any.

There was, I think, a lot of contributory negligence in this case, because Pollinger, if there was anything wrong with the trapeze when it went up, and he examined it and failed to note it, he was certainly guilty of negligence. But he did not notice anything. The evidence is clear on that subject.

Pollinger was anxious to get to the side of his wife. I don't blame him for that; but I am afraid he misstated [616] himself slightly when he said that he could jump faster than he could run. If that is true, he is the only human being that has ever been able to do that, and the reason obviously is that you get more propulsion from your feet striking the ground, than anything suspended in air. Being a track man, I know that absolutely; if you keep your feet on the ground you can run faster than you can jump. That is a little inconsistent, and only shows the extent to which a witness, cornered with a difficult explanation, will go.

Regarding the operation of the net itself, gentlemen of the jury, in the first place, that net you will remember, was constructed in the manner, and operated in the manner, required by Miss Olvera herself. It was apparently satisfactory to her. In fact, she so testified; otherwise, over a period of six or seven months, when it was used, she would have protested regarding it. Likewise, it is apparent that it was operated on the day in question in the same manner that it had been therethrough. The only thing she said is true on that particular day is that these men did not move in unison and catch her when she fell. Let us consider the probability of a thing like that. Let us weigh it, first, in the light of ordinary negligence, gentlemen of the jury; then we will test it with the light of gross negligence.

It is an infallible rule of physics that a falling body goes 16 feet the first second, and accelerates to 32 feet the [617] second second. She fell 22 feet in this case; perhaps a foot or two more, and the total time elapsing, gentlemen of the jury, from the time she commenced her fall—and the rule involved is one which involves the object starting from a stationary start, which she was, that is to say, she started falling, and of course, the first few feet she did not fall as fast as she did the next eight or ten of the first 16; mind you, it would take one and one-quarter seconds, approximately, for Miss Olvera to fall from the front of that trapeze bar, and she was standing up, and it could only have been a foot or two higher than 22 feet at most, because she said she was standing up. You can figure that out yourselves; one and one-quarter seconds, gentlemen of the jury, for that body to fall clear to the ground.

Gentlemen of the jury, do you believe that eight or ten—call it eight men, holding a net, suddenly confronted without warning of a situation, such as these men were, could humanly possibly have reacted in unison, and have moved that net over a distance of from one to two feet, sufficient to catch that woman, and obtain that result in a second and a quarter? You couldn't get eight men to move in unison that fast. It is not possible. You could not get all eight of them to realize what was happening in that length of time; not one of them could have moved. They could have caught her, maybe, if Miss Olvera in falling had caught on the ropes or the rigging on her first second or second second, and then [618] fell to the ground; perhaps they then would have had enough time—three or four seconds—in which to react, but not, gentlemen of the jury, not in a second and a quarter. or-roborative of that contention is the fact that one man was

struck, according to Mr. Marcus' argument, while he was apparently attempting to get out of the way. Even then that man would not have stood there, and have been struck, who was attempting to get out of the way, if he had time to get out of the way. That point, if there were any doubt in your minds on the subject, would certainly be obviated by multiplying that by eight. Try to get eight ordinary responsible prudent men, which is testing it under the rule of ordinary negligence—ordinarily prudent, to move the net in such a short space of time. Bear in mind, some of these men are on the end of the net; not all sideways; they are there around the whole thing. It is not physically possible, gentlemen of the jury, as a pure matter of ordinary care; but when you test that situation in relation to gross negligence, and state that these men or their employers are guilty of gross negligence in failing to move that net that distance, under those circumstances, in that short space of time, it just isn't possible. It isn't humanly possible to do that; and it isn't true that they were guilty of any gross negligence.

I have pointed out that they acted as ordinarily prudent men would have acted. I will point to another circumstance [619] that would indicate that fact. This woman fell so close, not to exceed a foot, perhaps a little less, an ordinarily reasonably prudent man would have thought, especially if she were in a ball, turning over, that she would fall into the net. An ordinarily prudent man might have thought it was not necessary to move, under those circumstances, if they could move; and to charge that same ordinarily prudent man, not only with negligence, under those circumstances and conditions, but with gross negligence, so bad as to have constituted a willful disregard for the rights of another, I am sure you

are not going to do, gentlemen of the jury. It is not right.

I think what happened in this case is actually related by Mr. Williamson. I am only picking out his statement, because it is before me:

"She was getting ready for her act and talking to me. She said that she was going to do a good act because some of the officials of Ringling Bros. was there sitting in the seats in front of her rigging. She asked me to point out Pat Valdo and show her where he was sitting. Pat Valdo is one of the big men from the Ringling show, and he has charge of hiring all the artists. She looked very nervous to me.

"Q—What occurred?

"A—She got up there and done her full act until nearly to the finish, and she fell from the last trick that she done. * * * She fell from the bar of the trapeze while she was [620] making a bow to the audience with her right hand extended to the audience. All of a sudden she lost her balance and fell to the ground. * * * At the time she fell, she was swinging more farther than usual, and when she fell she fell beyond the net."

Gentlemen, that's what happened to Miss Olvera. She was there, anxious to get back to the Ringling show, which was the big show. Pat Valdo came over that day. They were 40 miles away, in Texas, or Kansas, or a place adjoining them, so she knew that, and put a little extra vim into her act to impress Pat Valdo, and, as Miller said, she fell, in her style. Style means that little gesture or motion she was giving to the audience. That is not an act for which these defendants should have a record made of the excoriating criticism of gross negligence. The fact of the matter is it was Miss Olvera's own unfortunate

act, or her own carelessness that caused the misfortune; it was not the defendants'; and money should not be taken away from these defendants, and given to this plaintiff, just because she suffered an accident. That is not right; it is not the law; it is not justice, because the defendants are here entitled to the protection of the law and the court, just as the plaintiff is.

To summarize briefly, gentlemen of the jury, and then I am through—and let me suggest to you that in order to hold the defendants you would have to find against us on all five of these points; not one, but all five, because, as the [621] radio game goes, not one, not two, not three, not four, but all five. She was performing under this particular contract, and I have called the terms to your attention. I sincerely hope you will study it in the jury room. Its terms are clear and unambiguous. It is an independent contractor's case, and the relationship of master and servant does not exist. And an independent contractor is not entitled to the same degree of care as an invitee or guest, or a number of other relationships, including that of master and servant. The responsibility owed to an independent contractor is only to protect the independent contractor from conditions of which the contractee has knowledge, and the independent contractor has neither actual nor constructive knowledge. None of these factors exist in this case; so that it not being an independent contractor's case, the plaintiff is not entitled to recover.

The Court: Pardon the interruption. Will you read the last part of Mr. Combs' statement?

(Record read by the reporter.)

The Court: You are stating what you believe the court will instruct the jury?

Mr. Combs: That's right, your Honor, I believe the court will so instruct the jury.

Second: Her contract, and the accepted procedure in the show business, provided that she controlled the inspection and supervision of the apparatus. And, further than that, [622] gentlemen of the jury, she actually did so on this particular occasion, because Pollinger leveled it off; and if he didn't level it off, he should have; and to have failed to do so would have made him a principal, and his own wife in this case responsible for his contributory negligence in that regard.

Third: She accepted all of the risks incident to this class or type of business. She knew them all; had vast experience. In fact, as I recall, she said she started when she was two years old, and her father held her on his hand, like this, she said. That was one of the reasons why she had her husband examine and look at this apparatus from time to time. He was the first to inspect it, because she had confidence in his inspection, and knew it would be done well. On account of that fact, in this case, because she knew the risks of the business, to have been neglectful in that regard would have been contributory negligence on the part of the plaintiff; and if you find there was any such negligence, no matter how slight, I believe the court will instruct you if it contributed proximately to the result in the case, you must find for the defendants in this case.

Fourth: The release of liability clause in the contract itself, which as I have outlined to you, requires a test more severe than ordinary negligence, and I believe the court will instruct you in that regard, in substance as follows: Gross negligence is different and far greater than ordinary [623] negligence. Gross negligence has

been defined as a want of slight diligence. A want of even slight diligence; an entire failure to exercise care.

Already haven't we gotten a verdict for the defendants on these first two tests? The third one is the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of a conscious indifference to consequences.

Is there a single bit of evidence in this entire case, gentlemen of the jury, where any such condition of fact existed? Do you believe that these net holders were consciously indifferent to consequences? Do you believe they exhibited an entire failure to exercise any care? I don't think you do. They didn't. There is no question about that. The rule even goes further. We believe that the court will instruct you that it has to amount to a willful disregard of the rights of another, or what amounts to that. There was not any of that in this case, gentlemen of the jury. On either of those phases there was no gross negligence.

Point five: If they go beyond that, gentlemen of the jury, it would be an unavoidable accident. That is all. If it is an unavoidable accident, I believe the court will instruct you that no one can recover in the case, because, of course, no one is negligent.

Well, I appreciate I have spent my hour, your Honor.
[624]

The Court: No, you have not. Besides, the court took out some of your time.

Mr. Combs: How much time have I consumed?

The Court: You have about 14 minutes.

Mr. Combs: Now, gentlemen of the jury, I have about 14 minutes more to argue. I am not going to take all of

that time. I am going to say, in closing, I want to reiterate the five points I have just indicated:

1. This woman was performing under her contract as an independent contractor, and not as a servant, and the duty owed her was entirely different than that owed to the ordinary servant or any invitee;

2. Her equipment was required, under her contract, to be inspected, supervised and controlled by herself, and that was done, gentlemen of the jury, in this case, and the evidence shows it.

3. She accepted all of the risks and hazards of her business.

4. The plaintiff could not possibly recover in this case, because she has not shown gross negligence, or wanton disregard for the welfare or safety of others, on the part of the defendants; and,

5. The most that can be said of the plaintiff's claim, is that she suffered an unavoidable accident, if it was not the result of her own contributory negligence.

I want to thank you gentlemen of the jury for listening [625] patiently to me, in what was a technical and somewhat difficult argument. I think you have listened to this case attentively and thoughtfully all the way through. We have no hesitancy or doubt or concern in submitting this matter. When I say we, I mean I, as representing these two corporations, because we know that you are in that frame of mind, in deciding this matter, that you would be in, if your own personal matters were involved; and we rest solidly and confidently on the factual basis, not on emotional and sentimental appeal. And that is right, and that is as it should be.

(The court after admonishing the jury took a short recess.)

(Stipulated that the jurors were all present and in their seats.) [626]

CLOSING ARGUMENT BY MR. MARCUS.

Mr. Marcus: If this argument had come from any other source than able counsel for the defendants in this case, I would rather be amused, but when he asks you people, you men of the jury, to believe men like Chandler Miller, as being honorable, fine, upright witnesses, something is radically wrong in the administration of justice, when by ingenious device, by argument that is hardly deserving of one who occupies the position as counsel does, to say, what else could these men holding the rigging have done? Didn't they act as prudent men should have done? Under the circumstances, standing there like pieces of wood, and not to have moved one inch, but standing there, and failing to move—was that the right thing for them to have done, to have stood there and not to have moved?

What was the purpose of having men standing there and holding the net? You may have seen in motion pictures firemen holding a net, watching people, waiting for them to be caught in the net. That is the purpose of a movable net. That is the reason they had that kind of net there, holding it; men of experience—at least they should have been experienced—holding it for that purpose, if someone should fall, to catch them in the net.

They should at least move; should at least make an effort. Was that done? No. That fellow standing there—I have got [627] another name for him—probably pulled his head aside and got caught on the shoulder. The rest did not matter. That is the testimony of Chandler Miller. Is that what you call the exercise of due care and caution?

Is that what you claim this plaintiff assumed? Is that what she did, when she assumed the risks of her employment? Does that mean that she assumed the risk of somebody else's gross negligence, of the employees of the circus? Those are the insinuations, innuendoes, the intimations, because she gave them a tip once in a while, because she told them their work was nice and good, on occasions, that they were her employees, working for her. Why was that insinuation made? Because we don't want the onus; we don't want the responsibility; we don't want the negligence, if any, attached to us as a corporation. What was the word that was used? Don't shame us by insinuating by your verdict that we are guilty of gross negligence. No, don't shame them.

He says: We are a mighty corporation. We are the greatest circus in the world, and she was working for the next to the largest circus in the world. And who made that circus? Does the name Ringling, or Barnum & Bailey, or Barnes, mean anything alone, without people like Olvera and like other performers? They made that circus; they made the circus what it is. They risk their lives every day, under the terms of that vicious contract which says: You take it or leave it. And counsel very dramatically says: Take it [628] or leave it, because if you don't, and the contract is in some other form, whereby we assume some of your responsibility, some of your risk, you have got to take to earn the few paltry dollars you earn per week, it might break us. Those are his words.

Do you know why they put "independent contractor" in that agreement, that printed contract? Counsel knows, and I know. He says there is no relationship of master and servant. No, there isn't. Why? Because he knows we would not be in this court; there wouldn't be any law-

suit if there was a relation of master and servant. The Industrial Accident would have taken jurisdiction of this case, and then we would have been compensated for her services, regardless of negligence, regardless of contributory negligence, or gross negligence. She would have been paid. This vicious contract, that was printed and delivered to her, it says "Independent Contractor Agreement." Independent for Ringling Bros. Circus. And that's the reason why they put that on there.

Counsel again says: Maybe Mr. Marcus didn't comment upon the hooks, and maybe he didn't comment upon the bar or the variation of one end of the lines, or the clevis, or the 8-hook, because he wanted me to do it, and then get me boxed up. Counsel, it isn't for me to box you up. You have boxed yourself up. That's just what you did. Let us start from the testimony alone. I didn't comment upon that, but I [629] will now, and if it boxes you up, it's just too bad.

There were five witnesses in this case. Jack Lysaught was one; Miguel Aristo was another; employees of this circus.

Mr. Combs: Excuse me, but Jack Lysaught's testimony wasn't read.

Mr. Marcus: I beg your pardon. I read Jack Lysaught's testimony.

The Court: We will have to refer to the record.

Mr. Combs: If you did, I will withdraw my comment to your credit. Was the testimony read?

Mr. Marcus: It was.

Mr. Combs: All right. We will withdraw the objection.

Mr. Marcus: Charles Johnson, Mr. Yacopi, who has been sitting back there, and all of those were employees of

Ringling Bros. and Barnum & Bailey's Shows, or Barnes. They were employees of theirs at that time, and some of them after that date. What did they testify to? At least we have got the testimony from the mouths of the witnesses themselves, who were working for the circus at the time. They said there was no music going on; at least some of them said that. I am not going to point out which witness said what, but this was the gist of all that testified: When she came to the final portion of her act, which was a feature performance, the music stopped. She was performing on that bar up there, and she was swinging out. All of a sudden they heard a noise of the trapeze, the noise that the trapeze [630] made when it came down, and they looked up. Aristo said, Yacopi said, Johnson said, and I believe another witness said, at least Miss Olvera said so, and her statement stands in the record; not her own statement, as counsel would have you believe, of the conditions there, but the statement of the employees of the circus themselves, that one end of that line was lower than the other end, of this trapeze bar.

Then by some ingenious argument that he wants to indulge in, so far as the law of physics is concerned, he says: Gentlemen, a body, starting to fall from a fixed point, dropping straight down, falls 16 feet per second. You gentlemen know, and I know, that a body starting at one point, falling straight down, falls 16 feet per second; but how does that apply to a woman who is swinging on a trapeze back and forth, and she swings out on the bar, and she starts to fall; she grabs her knees; she turns a somersault in the air, and to all of that he wants to apply the law of physics.

We are not dealing with a dead body, because she is not dead yet, and she was not falling straight down. That is why that argument is not plausible or reasonable. Gentle-

men, when you get into a jury room, figure all of these facts. Take out your watches when you get there. She had a fall of about 22 feet, and see what a second is. How long does it take to move that net one foot? That is all that is involved in this case. That is all we are concerned with. [631]

Counsel says—what was the other assumption of risk? I say to you that certainly she did not assume the negligence, and the court will instruct you to that effect, because if she assumed negligence, and assumed gross negligence of the employees of the circus themselves, we would have no business in this court, and would have no lawsuit. But that is not the law. That is not the instruction the court will give you, because she does not assume somebody else's negligence.

She assumes the risks of her employment. That might be an unavoidable accident. She might have slipped, on a trapeze, and have fallen down. She was not under that contract, because being an independent contractor, that's a risk of her employment. But don't consider any shame to this corporation, this company, because of their being grossly negligent, because that would not be proper. The men holding the net there, the employees of the circus, are bound to use some degree of care. Would you say it was using a slight degree of care—and I am using his own words—would you say it was using a slight degree of care to have stood there and not to have moved that net at all? To have looked and to have failed to see is just as bad as not to have seen at all. To do something required to be done under the circumstances is just as bad as not doing anything at all, which they didn't do. There wasn't any degree of care exercised at all. There wasn't any care [632] exercised. The only thing they had to do was to

push that net over. And the argument that counsel has advanced, and wants you gentlemen to believe, is that they acted as prudent men in failing to do anything, because Miss Olvera at least in falling could have guided herself to have fallen in the net. Did you hear that argument? They assumed she would fall into the net. Maybe she should have sent a message beforehand that she was going to fall, and to please move the net. That would have been just as plausible. It is just as ridiculous.

They were put there for that purpose. They didn't need eight men holding the net, to stand there, if it was a movable net, to have caught her, because that was the purpose for which they were placed there; that was the sole thing they had to do; they had nothing else to do but to watch her net; and when there was some untoward accident in this case through the faulty erection of that trapeze, because she went through her act already, at least to the point where she stood up, she fell, it was their business, their duty, their obligation, because they were employees of that circus, under that contract with Ringling Bros., to have moved in a slight degree, and to have caught her, and to have avoided this accident. That was all that was required of them to be done.

What else have they attempted to show here? They claim that Mr. Pollinger himself, because he stood there and [633] watched them lowering the bar, assuming that to be true, agreeing with them for the purpose of this argument, that he looked at the bar, and did with his hands like that, that he was responsible for the failure of that apparatus, not because it was level, because everyone agrees it was level, and maybe it was level, but because the top bar was not level. Possibly counsel has had more experience in physics, chemistry and mathematics than I

have had, but wasn't that a spontaneous, honest opinion of Miss Olvera when she took down that little pocket book—Miss Olvera, if one line is shorter than the other, then one side will swing further than the other?—I don't think so; it didn't happen in my case, because the lower bar was level. And she took out her pocket book spontaneously and demonstrated to you gentlemen just how it happened.

Miss Olvera has been accused of being a great dramatic artist. We haven't taken that honor yet. We have only proposed for her that she was a great trapeze performer, which has nothing to do with being a dramatic artist yet. Maybe this feeling of hers that you see has come from the bottom of a tortured heart, a tortured body, and if that is sentiment, let it fall where it may, because that is just what her condition is today. If she has shed tears, it is because she has got to fight for everything she has got, and, gentlemen, God only knows this means everything in the world to her. She has waited a long time for it. If she has waxed [634] a wee bit dramatic because of it, it has come from the sincerity of her soul; not as counsel would have you believe, that it is a dramatic gesture to ingratiate herself in your hearts. Shame for suggesting that, counsel, because you, as well as I, know the sincerity of her feelings, and of her true and honest condition.

Gentlemen, I am going to leave the case with you, with a sincere and abiding conviction that you are going to do justice. If you have to shame this corporation, because of gross negligence—and counsel has attached a great deal of significance to the fact that it is gross negligence, which means more negligence than ordinary negligence, then do it; for goodness sake do it. It has to be done. It means a lot. This is her last opportunity. It has taken a long time, months and years, to get so far, and I rest

this case with you gentlemen, knowing that you will do justice. Thank you.

(The court after admonishing the jury here took an adjournment until 10:00 o'clock a. m. the following day, Wednesday, January 12, 1944.) [635]

Los Angeles, California, Wednesday, January 12, 1944;
10 a. m.

The Court: The members of the jury are all present. Is it so stipulated?

Mr. Combs: So stipulated.

Mr. Marcus: So stipulated.

(Court's Instruction A):

The Court: It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as the court gives it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

(Plaintiff's Instruction No. 4):

Any evidence that has been received of an act or omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence, but evidence of oral admissions of a party other than his own testimony in the trial, ought to be viewed by you with caution.

(Plaintiff's Instruction No. 5):

A witness false in one part of his testimony is to be distrusted in others, that is to say you may reject the whole testimony of a witness who wilfully has testified

falsely as to a material point, unless from all the evidence you believe that the probability of truth favors his [636] testimony in other particulars.

(Plaintiff's Instruction No. 6) :

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witness and after weighing the various factors of the evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of one witness.

(Plaintiff's Instruction No. 7) :

Your verdict must be based solely on the evidence received and the law as given you in these instructions, and not upon anything you may have otherwise heard or read. The instructions are to be considered as a whole.

(Court's Instruction B) :

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation concerning the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it.

(Plaintiff's Instruction No. 8) :

You are the sole and exclusive judges of the facts in [637] this case and of the credibility of the witnesses. Your power of judging, however, is not arbitrary, but must be exercised with legal discretion and in subordina-

tion to the rules of legal evidence. You are not bound to believe the testimony of any witness unless such testimony imports verity and establishes conviction in your minds. Nor are you bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser number or against other evidence satisfying your minds. Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case, if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statement he or she makes, by his or her candor and fairness, or lack thereof, and by any other fact or circumstance elicited during the trial which may aid you in determining as to whether the witness has spoken the truth.

(Plaintiff's Instruction No. 9):

The term "preponderance of the evidence" means that the evidence on one side is of greater weight than the evidence produced on the opposite side; it does not mean necessarily that a preponderance is produced by a greater number of witnesses—it is the greater weight of the credible evidence as it may appear to the minds of the jury. [638]

(Court's Instruction C):

The burden is upon a plaintiff alleging gross negligence to prove such negligence by a preponderance of the evidence, and that such gross negligence was the proximate cause of injury to the plaintiff. To establish the defense of contributory negligence, the burden is upon the defendant to prove by a preponderance of evidence that the plaintiff was negligent and that such negligence con-

tributed in some degree as a proximate cause of the injury. Contributory negligence may be inferred from the whole evidence, or a part thereof, without regard to which party or parties introduced such evidence.

(Plaintiff's Instruction No. 14-A):

If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, [639] Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if

any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows. [640]

(Plaintiff's Instruction No. 16):

If after considering the evidence you find the plaintiff is entitled to recover, you will consider in fixing the amount of the award the elements of damage that I now am about to mention; the reasonable value of plaintiff's time lost, if any, since her injury wherein she has been unable to pursue her occupation. In determining this amount you should consider evidence of Plaintiff's earnings and the manner in which she ordinarily occupied her time before the injury, find what she was reasonably certain to have earned in the time lost had she not been disabled; you will also consider not only the element of damage heretofore mentioned but also such sum as will reasonably compensate plaintiff for the pain, discomfort and anxiety, if any, she has suffered by her and proximately resulting from the injury in question; and for such pain, discomfort and anxiety, if any, as she is certain to suffer in the future from the same cause. Also the sum as will reasonably compensate plaintiff from any loss of earning power occasioned her by the injury in question

and from which she is certain to suffer in the future. In fixing this amount you will consider what plaintiff's health, physical ability and earning power were before the accident, and what they are now, the nature and extent of her injuries, whether or not they are reasonably certain to be permanent or if not permanent, the extent of their duration all to the end of determining the effect of her injuries upon her by the earning capacity and the present [641] value of the loss so suffered. Damages, if given, must be reasonable and your award, if any, must be based on a preponderance of the evidence. Such damages, if any, may not exceed the sum prayed for in the amended complaint.

(Defendants' Instruction No. 2):

If the jury find from the evidence that the plaintiff herself was careless or negligent at the time and place of the accident, and that such negligence proximately contributed to the injury which she sustained, then the plaintiff cannot recover damages in this case and your verdict should be for the defendants.

(Defendant's Instruction No. 4):

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and that there was a defect in said apparatus which was the proximate cause of her injury, and if you find that plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants.

(Defendant's Instruction No. 5):

I further instruct you a contractee owes no duty to an independent contractor, other than to protect the independent contractor from conditions of which the contractee has [642] knowledge and the independent contractor has neither actual nor constructive knowledge.

The Court: Mr. Combs, do you have a copy of the instructions?

Mr. Combs: Yes, I do.

The Court: No. 4. May I have it? I want you to read that, please.

The court instructs the jury to disregard the instruction before the last entirely, and in lieu thereof I shall read this one.

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and that there was a defect in said apparatus which was the proximate cause of her fall, and if you find that plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants upon the question of gross negligence insofar as the erection and placing in position of plaintiff's apparatus is concerned.

The Court: The next one, will you read that, please?

(Defendant's Instruction No. 7):

You are instructed that the evidence shown is conclusive that at the time of the accident in question the plaintiff, [643] America Olvera, was performing duties as-

sumed by her under her written contract with the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and no other; that said written contract is free from ambiguities and clear in its terms and the court finds that the relationship created by said written contract is one of "independent contractor" on the part of plaintiff, and "contractee" on the part of the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

(Defendants' Instruction No. 9):

You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defendant was a direct and proximate cause of the injury to the plaintiff.

Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so light a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences. [644]

(Defendants' Instruction No. 11):

You are instructed that if you find defendants were guilty only of ordinary negligence in relation to the plaintiff in this case and were not guilty of gross negligence toward her, you must find for the defendants in this action.

(Defendants' Instruction No. 17):

In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover if her injuries were caused by such danger and peril, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.

(Defendants' Instruction No. 19):

In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant. Your verdict should not be [645] based upon sympathy for or prejudice against any party.

(Defendants' Instruction No. 22):

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor,

one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

(Defendants' Instruction No. 23):

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or [646] caution, still, no one may be held liable for injuries resulting from it. Both gross negligence and proximate cause, as defined in these instructions, are requisites for founding liability.

(Defendants' Instruction No. 24):

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of gross negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that the cause of the accident was one not involving gross negligence on defendants' part as it is that gross negligence on their part was a proximate cause, then, because the conflicting probabilities are equal, a case against the defendants has not been established.

(Defendants' Instruction No. 25):

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. Inasmuch as the amount of caution used by the ordinarily prudent persons varies in direct proportion to the danger known to be involved in his undertaking it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, [647] the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

(Defendants' Instruction No. 26):

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were grossly negligent and that such gross negligence was a proximate cause of injury to the plaintiff.

(Defendants' Instruction No. 27):

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

(Defendants' Instruction No. 28):

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment

on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

(Defendants' Instruction No. 30):

You are instructed that an unavoidable accident is one that occurs while all parties are exercising ordinary care, [648] and if you shall find from the evidence that both plaintiff and defendants were exercising ordinary care at the time of the accident, you shall find that the accident was unavoidable and you shall render your verdict in favor of the defendants.

(Defendants' Instruction No. 31):

You are instructed that the plaintiff was working for defendants under and by virtue of the terms and conditions of the contract between the parties hereto executed on September 24, 1936; that the same is a valid, binding and enforceable contract, and you are further instructed that under the terms and conditions thereof the defendants are released from any acts of ordinary negligence of their part in connection with the operation and management of the equipment involved in this accident. If you find that the defendants were not guilty of gross negligence in the maintenance and operation of the equipment involved in America Olvera's act, you are directed to bring in your verdict for the defendants.

Whatever your verdict is, it requires the unanimous agreement of the members of the jury, and it must be signed by your foreman. For your convenience the court has had prepared some forms of verdict, which you may take with you when you retire to deliberate.

Will you swear the officer?

The court now stands recessed.

(Recess.) [649]

Mr. Marcus: If the jury should come in in my absence, may it be stipulated that the verdict may be returned in my absence?

The Court: It has been agreed that the exhibits, with the exception of the trapeze and blackboard, may be sent up to the jury.

Mr. Marcus: It is so stipulated.

Mr. Combs: So stipulated.

Come now the defendants in the above-entitled action, and pursuant to stipulation and order of court herein, hereby make, present and file their objections to instructions given at the request of plaintiff in the above-entitled matter, and further except to the giving of said instructions on the following grounds, for the following reasons:

Object to the giving of plaintiff's instruction No. 14 on the subject of the measure of damages, for the reason that the same does not truly and correctly express and relate and state the law of Kansas, or the law of California, regulative of damages, in that it includes elements not proximately attributable to an injury, and that the same violates the law of any jurisdiction, for the foregoing reasons.

Come now the defendants, and each of them, and object to the failure of the court, and refusal to give instructions submitted by the defendants, and excepts to the ruling of the court in connection therewith, by virtue of and on account [650] of and for the following reasons:

Object to the court's modification and rewriting of plaintiff's proposed instruction No. 4, for the reason that it includes and adds elements other than those properly the subject matter of this case. We will return to a further objection concerning this instruction later, the court at present having the defendants' copy.

Object to the failure of the court to give the entire defendants' proposed instruction No. 5, and to the failure of the court to give any instruction beyond the word "knowledge," as submitted, for the reason that the defendants were entitled to an expression and a declaration that they were entitled to a verdict in the event the facts and circumstances related in the remaining portion of said instruction, not given by the court, were found by the jury to exist.

Object to the modification of the court of defendants' proposed instruction No. 31, in using the word "maintenance" in lieu of "management," being the 22nd word from the end of said instruction, on the ground that "maintenance" has a different meaning than "management," and that the same confused the jury, and the defendants were entitled to the use of the word "management."

Come now the defendants, and object to the failure of the court to give, and to the court's refusal to give, and except to his ruling in that connection, the following [651] instruction:

Defendants' Proposed Instruction No. 1. In this case defendants were entitled to a directed verdict for the reason that there has been no evidence produced during the trial of this case of either gross negligence or willful misconduct, and that the evidence does not establish even ordinary negligence in this case; and upon all the grounds of the motion for a directed verdict heretofore made.

Object to the failure and refusal of the court to give defendants' proposed instruction No. 3, on the grounds that said instruction should properly have been given, as it defines and informs the jury as to the rights and remedies available to an independent contractor, and it tests and

establishes the degree of responsibility of defendants in contractual relationship in this case, and likewise deals with the defense of assumption of risks.

Come now defendants, and object to the failure and refusal of the court to give defendants' instruction No. 6, for the same reasons and upon the same grounds as those contained in the objections to the failure and refusal respecting instruction No. 3; on the grounds that it is an instruction of the law regulative of the contract of the parties hereto, and as such, one which the defendants were entitled to have.

Come now defendants, and object to the failure and refusal of the court to give instruction No. 8, as submitted [652] by defendants, on the grounds that the same omits and leaves out the right of defendants to the defense of assumption of risk, and impairs the obligation of the contract of the parties hereto.

Come now the defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 9-A, on the grounds, in doing so the court deprived the jury of the definition and the law of gross negligence, and failed to include in the instructions given by the court on the subject the element of willfulness, particularly inasmuch as the statute of the State of California refers to willful misconduct, or wilful injury, only, and that was likewise a part of the federal law in connection with the consideration of this case.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 10, on the grounds that failure to give the same leaves the jury uninformed on the law of this case relating to gross negligence, and the right of the plaintiff to recover.

Come now defendants and object to the failure and refusal of the court to give defendants' instruction No. 19, and to the court substituting one of his own instructions on that subject, on the grounds and for the reason that the instruction substituted by the court does not fully and completely state the law regulative of the fair consideration to be given to the corporate defendants, and that defendants' [653] proposed instruction 19 does. That to deprive defendants of their instruction on that subject deprives them of the complete consideration and instruction of the jury thereon.

Come now defendants and object to the failure and refusal of the court to give defendants' instruction No. 20, on the grounds that the same eliminates from the consideration of the jury the doctrine of assumption of risks, to which, under the law, and under the contract, defendants were entitled to have considered by the jury.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 21, on the grounds, and for the reason, that it deprives the jury of a consideration of the law of fellow servant, and the law instructive of the conduct of fellow servants. In this case the court allowed evidence to go in, over the objection of defendants, to the effect that any new relationship, other than that of the contract, was created by operation of law, and the conduct of the parties, in relation to the management and maintenance of the apparatus, and in particular of the net. This brought into focus the master and servant rule, and the instruction, therefore, should have been given.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 29, for the reasons, and on the grounds hereto-

fore stated in connection with instruction No. 21; that the court allowed [654] evidence to go in on the subject of fellow servant, and the jury should have been instructed on the law regulative thereof.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 32, on the grounds and for the reasons that in refusing to do so the court deprived the jury of an adequate consideration of the subject of gross negligence, and of the element of wanton, reckless, and willful misconduct, as defined by the statute of the State of California, and in conformity with the federal court rule; and that the jury, not having been instructed at any time concerning the element of willful misconduct, or actions on the part of defendants or their servants, the court should have instructed a verdict for the defendants on the grounds that the release involved in the contract was binding.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 33, on the grounds and for the reasons stated in the objection to instruction No. 32, and for the further reason that the jury was thus deprived of a contrast or distinction between gross and ordinary negligence, and a definition of willful and wanton misconduct, and a distinction between willful and wanton misconduct and ordinary negligence.

Come now defendants and object to the court's own instruction given on the subject of contributory negligence, [655] on the grounds and for the reason that the same assumes facts and conditions not within the evidence in this case, and does not correctly and truly state the law of contributory negligence.

Come now defendants and object to the court's modification of defendants' proposed instruction No. 4.

At this point the defendants desire to object to all of the instructions given by the court on his own motion, including that given immediately following defendants' proposed instruction No. 4, and those two given immediately following plaintiff's instruction No. 9. These instructions have never been presented to, or in the possession of, nor read by these objecting defendants or their counsel prior to having been read by the court to the jury, and are not at this time available to counsel for the purpose of stating the grounds of objection thereto, but as soon as they are made available counsel will state in the record the grounds of objection, or file their objections in writing at a later time.

Come now defendants and object to the court's instruction, being a formula instruction, directing a verdict for the plaintiff in the event of certain circumstances and facts being found by them, said formula instruction not being at the present time before counsel, and this objection being made from memory only, counsel never having seen said instruction, it having been prepared and given by the court [656] of its own motion, and this objecting counsel never having seen the same, and the same not having been given a number, on the grounds and for the reason that said instruction does not include all the elements of defense raised by defendants in their answer, and in this case it purports to direct a verdict in the event of a finding on an indefinite number of facts, matters and things concerning the case, leaving out other defenses, and leaving out matters contained in the defenses pleaded by defendants. That said instruction does not correctly state the law, is confusing, and in conflict with other in-

structions given in this case, and contrary to law as given in this case.

The court now having presented the instructions referred to above to counsel, the following additional objections are made, and exceptions taken, in addition to those heretofore made:

The defendants object to the rewriting and changing by the court of defendants' instruction No. 4, for the reason and upon the ground that the same omits a consideration of the element of the net, as rewritten, which theretofore was included.

Come now defendants and object to plaintiff's instruction No. 14-A, and except thereto, on the following grounds and for the following reasons: That the same does not include or contain a complete statement of all the defenses raised by the defendants, and being a formula [657] instruction, and omitting several of said defenses, as stated in said answers, is improper and prejudicial, and should not have been given. Said instruction omits the defense of independent contractor, assumption of risk, fellow servant rule, element of willful injury, and the same fails to include the element of release of damages, both in relation to gross negligence and willful misconduct. That said instruction 14-A is objectionable, and defendants hereby object and except to the same, for the further reason that it is confusing, incorrectly states the law, is contradictory to the law as stated in other instructions, as the same exists in this jurisdiction, and regulative of this matter. That the same combines and confuses ordinary and gross negligence, so that the jury was thus mislead as to whether they could return a verdict based solely on gross negligence or ordinary negligence.

The Court: In giving instruction No. 31 the court did not intend to substitute the word "maintenance" for "management"; as used in said instruction, and in order to correct the same will call the jury down and re-read the instruction as the court intended to give it.

Mr. Combs: I think, your Honor, I am rather inclined to be of the impression that the matter is rather immaterial. In making this statement, however, I would not want to have the jury called in for the reading of other instructions. I want it understood this is the only one to which I waive my [658] objections. In other words, if the jury is to be called down for the reading of anything else—

The Court: I don't intend to. I don't see any purpose in calling them down for reading anything else. I am willing it should be corrected, unless you are willing to withdraw your objection.

Mr. Combs: I think we will withdraw our objection, your Honor.

The Court: Mr. Dewing, will you read some of the preliminary matters?

(Record read by the reporter.)

The Court: Mr. Combs, I went off the bench immediately to make a change in the copy of the instructions which I had changed myself, and I did not have time to complete the change for your copy before you began to give your objections, so I notice there is some statement you had made of the fact that the court had your copy. I asked you to let me have your copy so I could make the change in them.

Mr. Combs: That may have been one of these.

The Court: One of those was defendants' No. 4.

Mr. Combs: My reason for making that statement in the language that followed, was that should it occur that the jury came in in an extraordinarily short time, which was a conceivable situation, before I had the opportunity of looking at them, I wanted the record to appear that I had not.

The Court: It would not have made any difference. The [659] court would have permitted you to make your objections.

Mr. Combs: So far as that is concerned, I later made the statement in the record that I now had an opportunity to see these instructions, and I was then making my objections to them.

The Court: And you made all the objections and exceptions that you desired to make, after you were given copies?

Mr. Combs: That's right, your Honor.

The Court: I think, for the purpose of the record, any objection that you have made to 16—will you turn to 16, please?—that it should be 16, on the measure of damages. The one you have referred to as the formula instruction is plaintiff's instruction 14-A. Mr. Marcus, if you will approach the bench I will show you the one marked defendants' instruction. I will mark this 14-A.

Mr. Marcus: That is satisfactory.

The Court: Is that satisfactory to you, Mr. Combs?

Mr. Combs: Yes.

The Court: The number of the instruction to which the exception was waived—exception and objection—was numbered defendants' 31.

Mr. Marcus, if you have any objections to the giving or failure to give any of the instructions you offered, you may make them now.

Mr. Marcus: May we, your Honor, make the same after the jury comes in? Would you have any objection to that, counsel? [660]

The Court: I think you may just as well do it now, while we are waiting for the jury.

Mr. Marcus: Your Honor, I will sit here with the reporter, and dictate the same to him.

Plaintiff objects to the court's refusal to grant instruction No. 3, defining negligence, upon the grounds and for the reasons that the jury were entitled to be instructed upon the definition of negligence, upon which the charge of gross negligence was predicated.

Plaintiff objects to the court's refusal to give instruction No. 10, defining preponderance of evidence, and contributory negligence, and by what degree of proof each must be established, for the reason and upon the grounds that the jury were entitled to be instructed upon the theory that if such contributory negligence was established, that such contributory negligence must be so established by a preponderance of such evidence.

Plaintiff objects to the court's refusal to grant instruction No. 11, upon the grounds and for the reasons that such instruction defines the acts of the agent as being binding upon the principal, if done and performed within the scope of their authority, and further, that the contract provided and permitted such defendant, Ringling

Bros., to place the plaintiff with any other of its shows or circuses under its ownership or management, and provided that all terms and conditions of the contract continued, [661] prevailed and obtained, and that the jury, therefore, was required to be instructed that such judgment, if any, against Barnes be given against Ringling Bros. as the original party to said contract.

Plaintiff objects to the court's refusal to give instruction No. 12, on the ground that said instruction contains plaintiff's theory of the case without any defenses thereto interposed, which were elsewhere given in the instructions.

Plaintiff objects to the giving of defendants' instruction No. 5 on the grounds and for the reasons that the law is not that an independent contractee owes no duty to the independent contractor.

(The jury returned into court at 3:17 p.m.)

The Court: The members of the jury are all present. Do you so stipulate?

Mr. Marcus: So stipulated.

Mr. Combs: So stipulated.

The Court: Members of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Court: Mr. Colburn, you are foreman?

Mr. Colburn: Yes, sir.

The Court: Will you stand and read the verdict, please?

(The foreman of the jury reads the verdict in words and figures as follows): [662]

In the District Court of the United States,
Southern District of California
Central Division
No. 8367-B Civil

America Olvera, also known as
America Olvera Pollinger,

Plaintiff,

vs.

Al G. Barnes Amusement Company,
a corporation, and Ringling Bros.-
Barnum & Bailey Combined Shows,
Inc., a corporation,

Defendants.

VERDICT.

We, the Jury in the above-entitled case, find in favor of the plaintiff, America Olvera Pollinger, and against the defendants, Al G. Barnes Amusement Company, a corporation, and Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a corporation, and assess plaintiff's damages in the sum of Fifty thousand dollars (\$50,000.00).

Dated: Los Angeles, California, January 12, 1944.

WILLIAM E. COLBURN,
Foreman of the Jury. [663]

(The clerk here re-reads the verdict as above set forth.)

The clerk: Is that your verdict, each and all of the jurors?

(The jurors thereupon answered in the affirmative.)

The Court: Do you desire to have the jury polled?

Mr. Combs: Yes, your Honor.

The Clerk: As I call your names, gentlemen, will you state whether or not the verdict as read is your verdict.

(The jurors were thereupon polled, and each and every juror answered in the affirmative.)

Mr. Combs: If the court please, at this time defendants would like to make a motion for a stay of execution, to a period of 20 days beyond the date of a ruling on a motion for a new trial in this matter, if we may have such stay of execution.

The Court: Have you any objection, Mr. Marcus?

Mr. Marcus: Would it have to be that long, counsel? I don't think the customary period of a stay is that long.

Mr. Combs: Only this, your Honor: We are going to make a motion for a new trial. The last time we asked for 20 days and we got it. I don't believe the motion for a new trial will be passed upon in that period of time.

The Court: Could it not be granted until the motion is made, and then you may request additional time?

Mr. Combs: I am asking for it in this manner, because the last time we had to come in and get an order extending [664] the time, after the 20 days had expired. I think we are just saving ourselves time. The stay is customarily 10 days after the motion for a new trial has been made. I only put it 20 days, because we know these defendants, certainly Ringling Bros., are responsible, and are not going to get away, and it would not be a question of any hazard. Our alternative is the posting of a bond. What is the difference? Our company is worth several million dollars anyway, and it would not have any ad-

vantage by the posting of a bond. I say several million—perhaps ten or fifteen million.

Mr. Marcus: I suggest, your Honor, that the stay be granted. I am willing to stipulate that it be granted until the motion for a new trial has been made and determined.

Mr. Combs: Suppose the court determines it in chambers, and sends out notice?

Mr. Marcus: I am not going to run out here and grab a couple of elephants.

The Court: Wouldn't 10 days be sufficient?

Mr. Combs: Yes, I think 10 days is fine. It isn't so long. We can, without prejudice, make the motion then.

The Court: 10 days?

Mr. Combs: Yes, 10 days.

The Court: Have you any objection?

Mr. Marcus: No.

Mr. Combs: 10 days after the ruling on the motion for a new trial.

The Court: Yes. [665]

[Endorsed]: Filed Aug. 30, 1944. [665]

[Endorsed]: No. 10877. United States Circuit Court of Appeals for the Ninth Circuit. Al G. Barnes Amusement Company, a corporation, sued as Al G. Barnes, Inc., and Ringling Bros.-Barnum & Bailey Combined Shows, Inc., Appellants, vs. America Olvera, also known as America Pollinger, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Central Division.

Filed September 22, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 10877

RINGLING BROS.-BARNUM & BAILEY COM-
BINED SHOWS, INC., a corporation, and AL G.
BARNES AMUSEMENT COMPANY, a corpora-
tion, sued herein as AL G. BARNES, INC., a cor-
poration,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA
OLVERA POLLINGER,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY ON APPEAL

Statement of Points Upon Which Appellants Intend to
Rely on Appeal, Pursuant to Rule 19, Subdivision 6
of the Rules of Circuit Court of Appeals for the
Ninth Circuit.

Appellants intend to rely upon the following points:

I.

The District Court erred:

(a) In denying appellant Al G. Barnes Amusement
Company's motion to dismiss the amended complaint.

(b) In denying appellant Ringling Bros.-Barnum &
Bailey Combined Shows, Inc.'s motion to dismiss the
amended complaint.

(c) In overruling appellants' objections to the intro-
duction of evidence.

(d) In overruling appellants' motion for nonsuit.

(e) In denying appellants' requests for directed verdict.

(f) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(g) In denying appellants' motions for a new trial.

On the grounds that the appellee's amended complaint does not state facts sufficient to constitute a cause of action against these appellants in this: That said amended complaint sets forth a contract between appellee and appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., which contains a clause releasing said appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. from any liability for damages which might occur to appellee in carrying out the provisions of the contract and providing that the relationship between the parties was that of independent contractor; that the terms of the contract and the relationship of the parties relieved appellants of any liability whatsoever; that the verdict impaired the obligation of contract, thus violating the constitutional rights of appellants.

II.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' requests for directed verdict.

(c) In failing to give appellants' Instructions Nos. 9-a, 32 and 33, reading respectively as follows:

"The elemental idea of 'negligence' is failure or omission—the failure or omission to do something

which should have been done. Negligence that is 'gross' involves the additional and affirmative element of intent to do or wilfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness."

Appellants' Instruction 9-a.

"Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case."

Appellants' Instruction 32.

" 'Wilful and wanton misconduct' is such conduct as amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons."

Appellants' Instruction 33.

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

On the grounds that there was neither adequate allegation in appellee's amended complaint nor adequate proof adduced at the trial to support the verdict charging the appellants with gross or any other negligence and for the further reason that the purported amendment to the complaint inserting certain language which occurred while the case was on trial, was improper and any claim for gross negligence was barred by the statute of limitations, being the provisions of Part 2, Title 2, Chapter #3 of the California C. C. P., and in particular section 340 thereof.

III.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' motions for directed verdict.

(c) In refusing to give appellants' requested instructions on the subject of gross negligence or wilful misconduct, being appellants' instructions Nos. 9-a, 32 and 33.

(d) In giving of its own motion under the caption of plaintiff's instruction 14-a, the instruction which in effect instructed the jury to find for the appellee and against the appellants if, for any cause whatsoever, the appellants failed to catch the appellee in the net, and which said instruction, being a formula instruction, failed to include all of the affirmative defenses set up in appellants' answers, notably the defenses of fellow servant, assumption of risk, unavoidable accident, failure to inspect, and neglect of her own duties under contract.

(e) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(f) In denying appellants' motions for a new trial.

On the grounds that under the contract by which appellee was employed, appellee waived any action for damages on account of ordinary negligence of appellants. By giving Instruction No. 14-a the Court in effect abrogated the terms and conditions of the contract and by admitting evidence that a net was used as a part of the apparatus and that it was under the supervision and control of appellants, it abrogated the terms of the contract, made a modification thereof, and upon such modification allowed and directed a verdict in the event of ordinary negligence, or in fact in the event of the mere failure for any cause to catch appellee in the net. Further, in giving said formula instruction the Court failed to include all the defenses affirmatively pleaded in appellants' answers as they applied to any possible claim of negligence of appellants.

IV.

The District Court erred:

(a) In overruling appellants' motions for nonsuit.

(b) In refusing to give the following instructions: Defendants' Instructions Nos. 8, 20 and 21, reading as follows:

"You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her per-

formance, then you shall find in favor of defendants.”

Defendants’ Instruction 8.

“If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants.”

Defendants’ Instruction 20.

“If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master’s service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and

after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

Defendants' Instruction 21.

(c) In denying both appellants' requests for a directed verdict.

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(e) In denying appellants' motions for a new trial.

On the grounds that appellee under her contract and as an independent contractor, assumed the risks and hazards of her employment and her act as a trapeze artist in general.

V.

The District Court erred:

(a) In allowing evidence to be given over appellants' objections as to the construction and operation of the net.

(b) In instructing the jury concerning the operation of a net as follows:

"If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks

incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

"If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows."

Plaintiff's Instruction 14-a.

(c) In refusing to give defendants' proposed Instruction No. 5, reading as follows:

"And if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was in the knowledge of defendants and that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defect was the proximate cause of the injuries complained of you will find for the defendants."

Defendants' Instruction 5.

(d) In denying appellants' motions for a new trial.

On the grounds that appellee charges no negligence in her amended complaint in relation to a net, and no net is mentioned in the contract of employment, whereas the Court allowed evidence over appellants' objection concerning the construction and operation of a net; that in opening up this field by allowing the evidence and instructing as the Court instructed in Instruction 14-a, the jury was directed to find in favor of the appellee even though no gross negligence was shown in so far as the operation of the net was concerned, on account of the

fact that the modification of the contract by the Court resultant, relieved the appellee of her contract against liability as to even ordinary negligence on the part of appellants, without any pleading of modification.

VI.

The District Court erred:

(a) In refusing to give the following instructions requested by appellants on the subject of master and servant:

"The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail and will be your guide in your deliberation on the issues presented, and the Court will further instruct as to the application of the law of Kansas on the question of gross negligence and other issues presented."

Defendants' Instruction 10.

"If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an

unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

Defendants' Instruction 21.

"You are hereby instructed that the plaintiff, America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees."

Defendants' Instruction 29.

(b) In prohibiting appellants from an opportunity to examine Instruction 14-a before the same was read and before the jury was sent out to deliberate, in that manner prohibiting appellants an opportunity of re-offering certain instructions on the subject of master and servant in addition to those set forth in (a) *supra*, under the facts and circumstances as set forth in the affidavit of Lee Combs in support of the motion for a new trial herein, said instructions being attached as exhibit to said Motion for New Trial.

(c) In refusing to give instructions requested by appellants defining the duty of appellee under her contract to inspect and supervise the erection of her apparatus, being in particular appellants' proposed Instructions Nos. 3, 4, 6, 8, 20 and 21:

"I further instruct you that if you find there was a defect in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendants but that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants."

Defendants' Instruction 3.

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants."

Defendants' Instruction 4.

"If you find that the plaintiff, America Olvera, contracted by written contract to furnish a 'specialty act' in her customary manner for the defendant circus, and that the act had been prepared and arranged

by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees."

Defendants' Instruction 6.

"You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants."

Defendants' Instruction 8.

"If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants."

Defendants' Instruction 20.

"If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or

lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

Defendants' Instruction 21.

On the grounds that the Court instructed the jury that the appellee was an independent contractor and appellants independent contractees, and that the contract imposed a duty upon said appellee to inspect and supervise the erection of her apparatus, in which she admittedly failed, and on the further ground that the law as applied by the Court through instruction 14-a and the admission of evidence concerning the net, abrogated the independent contractor theory and in effect directed the jury to bring in a verdict for appellee on a finding of ordinary or no negligence at all, under a formula instruction.

VII.

The District Court erred:

(a) In denying appellants' motions for directed verdict.

(b) In overruling appellants' motions for nonsuit.

(c) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(d) In denying appellants' motions for a new trial.

(e) In refusing to give the following instruction:

"The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the cases, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant."

Defendants' Instruction 19.

(f) In permitting counsel for the appellee to make the following statements to the jury during his argument in relation to the depositions shown to have been taken in a legal matter, and concerning the appellants' conduct toward appellee:

"That is, the questions are written down, sent back there, and they have an opportunity of going through them and answering them, without the presence, as

was the case in this matter, of the plaintiff being represented by counsel."

Rep. Tr., p. 593, lines 9-13.

"It is obviously an out and out violation of their oaths."

Rep. Tr., p. 595, lines 1-2.

"Let us get down to the direct facts in this case. What are we predicating our case upon? What has happened here? Here is a lady in the prime of life, who went to work for the largest circus in the world, she being the feature attraction for this company, this company which had waxed rich and powerful and mighty upon the performances and ability of people like Miss America Olivera."

Rep. Tr., p. 595, lines 3-9.

"This is a printed contract that was given to her by Ringling Bros.-Barnum & Bailey Combined Shows. This is one of those contracts, that you can take it or leave it."

Rep. Tr., p. 595, lines 22-25.

"It's furnished to them; it's given to them, and they are told to put their signature to it, and that's that."

Rep. Tr., p. 596, lines 11-12.

"They provided a net for her. That net was held by the employees of the circus. What was the purpose of the net? I believe the court asked that of the witness Miller: What was the purpose of that net?"

Was it to catch her in safety?—Yes. Now, was that done in this case? No.”

Rep. Tr., p. 596, lines 19-24.

“We have the testimony of Mr. Williamson, the supervisor. He said he had a most excellent crew, who had been with him for a long time. He was not with the circus any more. Mr. Cronin is not there any more. That’s why I think you got the truth from this man.”

Rep. Tr., p. 598, lines 5-10.

“Here is a lady that has given the best part of her life to the rendition of her services for this company. * * * You give the best that’s in you. You give your life, or your services, and what do you get in the end? Probably just an empty life.”

Rep. Tr., p. 598, line 22

“ to p. 599, line 4.

“Do you want any money? If you do you work for it. Well, work how? Did they provide her with at least medical attention? Did they give her the means or ability to go out and get this money? No, they didn’t.”

Rep. Tr., p. 600, lines 1-4.

“Gentlemen, you have probably reached the conclusion that there was a previous trial in this case, and there was. It’s in the record. And there is another trial now; and dont you think we dont have to do everything in our power, our legal power, to

convince this circus here that they ought to take care of people who have rendered their services to them, and have given of their life."

Rep. Tr., p. 600, lines 18-24.

"Gentlemen of the jury, you have been very patient and very kind to me. I hope you will be kind to my client."

Rep. Tr., p. 601, lines 23-24.

"He says: We are a mighty corporation. We are the greatest circus in the world, and she was working for the next to the largest circus in the world. And who made that circus? Does the name Ringling, or Barnum & Bailey, or Barnes, mean anything alone without people like Olvera and like other performers? They made that circus; they made the circus what it is. They risk their lives every day, under the terms of that vicious contract which says: You take it or leave it."

Rep. Tr., p. 628, lines 18-26.

"And counsel very dramatically says: Take it or leave it, because if you dont, and the contract is in some other form, whereby we assume some of your responsibility, some of your risk, you have got to take to earn the few paltry dollars you earn per week, it might break us. Those are his words."

Rep. Tr., p. 628, line 26 to p. 629, line 5.

"Do you know why they put 'independent contractor' in that agreement, that printed contract? Counsel knows, and I know. He says there is no

relationship of master and servant. No, there isn't. Why? Because he knows we would not be in this court; there wouldn't be any lawsuit if there was a relation of master and servant. The Industrial Accident would have taken jurisdiction of this case, and then we would have been compensated for her services, regardless of negligence, regardless of contributory negligence, or gross negligence. She would have been paid. This vicious contract, that was printed and delivered to her, it says 'Independent Contractor Agreement.' Independent for Ringling Bros. Circus. And that's the reason why they put that on there."

Rep. Tr., p. 629, lines 6-19.

"If she has shed tears, it is because she has got to fight for everything she has got, and, gentlemen, God only knows this means everything in the world to her. She has waited a long time for it. If she has waxed a wee bit dramatic because of it, it has come from the sincerity of her soul."

Rep. Tr., p. 634, line 23 to p. 635, line 2.

On the grounds that the remarks above quoted and other remarks, the failure to give the instructions, and the conduct of the trial court, resulted in a bias and prejudice against appellants and an unfair trial to them, so gross that it could never be repaired by any direction or instruction of the court.

VIII.

The District Court erred:

(a) In denying appellants' motions to set aside the verdict for appellee and to enter a judgment in favor of appellants and for judgment non obstante veredicto.

(b) In denying appellants' motions for a new trial.

On the grounds that the damages in this case are excessive in that the evidence fails to show any measure of appellee's earning power or how long she might have continued as a trapeze artist, and fails to show the extent of the injury as sufficient to support said verdict, and fails to show that appellee suffered any permanent disability for any other reason than her own refusal to submit to proper and adequate and recognized medical treatment at the time she first suffered her injury.

IX.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' motions for directed verdict.

(c) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment non obstante veredicto.

(d) In denying appellants' motions for a new trial.

On the grounds that there is no evidence in the entire record supporting the claim or from which it might be inferred that any gross negligence occurred in this case, either in the operation, management, erection or use of the trapeze or of the net involved in this case, and that the facts in this case do not support the verdict.

X.

The District Court erred:

(a) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment non obstante veredicto.

(b) In denying appellants' motions for a new trial.

On the grounds that the court during the course of the trial made remarks prejudicial to appellants in the presence of and to the jury which affected and influenced the jury and created an attitude of bias and prejudice against appellants. Some of said remarks comprise the following:

"She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I dont mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?"

Rep. Tr., p. 16, lines 14-19.

"This is a very important phase of the case."

Rep. Tr., p. 17, line 9.

"You dont mean that a gift was made of the net?"

Rep. Tr. p. 23, lines 18-19.

"Maybe she does not understand the word 'establish'."

Rep. Tr., p. 30, lines 14-15.

"I think you had better do that. I think she might have some difficulty, because of her lack of knowledge of the language."

Rep. Tr., p. 32, lines 20-22.

"However, this seems to be preliminary."

Rep. Tr., p. 37, line 20.

"I think she has explained very thoroughly what constitutes her act."

Rep. Tr., p. 38, lines 23-24.

"She said the net was too heavy."

Rep. Tr., p. 63, line 17.

The Court: "In that position the outer edge of the net would be about eight or ten inches from your body.

Mr. Combs: It would depend on the length of the forearm.

The Court: I am looking at you."

Rep. Tr., p. 71, lines 2-5.

"The Court: I dont believe it would be a foot from the front of the net.

Mr. Combs: From my body to the net, isn't that right?

The Court: Anyway, they held the net out in front of them.

Mr. Combs: This looks to me like it was about 18 inches.

The Court: It isnt important.

Mr. Combs: Let us get it right. One foot to this point, and an additional four inches to the end of my finger.

The Court: You are getting your hands a little more extended.

Mr. Combs: It looks to me like it was about 18 inches, anyway.

The Court: It looks to the court less than a foot.

Mr. Combs: Let us get it exactly right, because I wouldn't want the record to show that, your Honor, because I think that is an important part in this lawsuit.

The Court: Mr. Marcus, go up and help Mr. Combs.

Mr. Combs: Have you got it? Put the measure on my body next to the elbow bone.

Mr. Marcus: What does the record show with reference to where the measurement is to be taken on your body?

Mr. Combs: The end of my elbow. Do you feel that? This is the end of the elbow.

Mr. Marcus: I am asking about the record; where is it to be taken from?

The Court: Help Mr. Combs to take any measurement he wants. See how long his elbow is.

Mr. Combs: From my elbow bone to the end of my wrist is one foot, is it not?

Mr. Marcus: Yes.

Mr. Combs: Correct, counsel?

Mr. Combs: Will you measure from my wrist out to where these fingers? I will put the hand as tightly together as I can.

Mr. Marcus: Four inches.

The Court: Measure from that part to the front of his body."

Rep. Tr., p. 71, line 25 to p. 73, line 12.

"You are referring to your right shoulder."

Rep. Tr., p. 74, line 18.

"You changed around to your left shoulder."

Rep. Tr., p. 74, line 21.

"You dont know whether it was the right shoulder?"

Rep. Tr., p. 74, lines 24-25.

"You may read it. The reading of it should not have any weight, because the court's ruling would be that it was not at variance with her testimony here; but for the purpose of the record you may read it."

Rep. Tr., p. 98, lines 9-12.

"Mr. Marcus, because of the court's knowledge from the preceding trial, I think it might be explained that Mr. Pollinger had a strong man act, because he speaks about coming in and pulling her up."

Rep. Tr., p. 128, lines 14-17.

"He has already said he heard a metallic noise something striking metal."

Rep. Tr., p. 134, line 26 to p. 135, line 1.

"I dont think you need answer that question. It is a rule of physics."

Rep. Tr., p. 146, lines 13-14.

"The Court: Dont argue with the witness.

Mr. Combs: I am just trying to bring my case out in a fair and proper manner.

The Court: You have a right to bring your case out, but bear in mind the admonition of the court."

Rep. Tr., p. 147, lines 17-21.

"Dont answer that. The court will limit the cross examination on that point."

Rep. Tr., p. 149, lines 17-18.

"No, he asked you in feet about how high the crane bar was. You don't have to be accurate; unless you know definitely, say approximately."

Rep. Tr., p. 153, lines 22-24.

"Mr. Combs, it would appear to the court this is an important matter, and I think you should bear in mind the rule in regard to leading questions."

Rep. Tr., p. 272, lines 14-16.

"I dont think it is material. The motion will be denied."

Rep. Tr., p. 333, lines 17-18.

"The Court: It has been stipulated that it is correct.

Q. By Mr. Marcus: Is that your testimony?

The Court: It has been stipulated that he was asked those questions, and he gave those answers.

Mr. Marcus: I want to follow it up, to determine whether that answer he gave is true.

Mr. Combs: It is argumentative, your Honor.

Mr. Marcus: It is a part of the impeachment.

The Court: I think he has a right to ask whether or not the testimony he is now giving is correct and accurate, or whether the testimony given at the other trial was correct.

Mr. Combs: That assumes a fact not in evidence. If there appears to be any conflict the witness has a right likewise to explain his answers. I think the question is argumentative, and I object to it upon that ground.

The Court: Reframe your question, Mr. Marcus.

Q. By Mr. Marcus: Mr. Thornton, is the testimony that you gave today true, or the answers that you gave in response to the questions of the court at the last trial true?

Mr. Combs: That is objected to as argumentative. That assumes that there is a difference between the two.

The Court: It must assume that there is a difference, or it would not be a proper question.

Mr. Combs: I dont think the question is proper, your Honor.

The Court: As I recall his testimony now he stated that when Mr. Pollinger came into the ring he did certain things with reference to the apparatus; that he showed the property men, or riggers, how the trapeze should be arranged, and that he gave them some direction regarding the guy ropes; that when

it had reached a certain position he held up his hand, and told them it was correct. That is my recollection of his testimony.

Mr. Combs: Yes, that is my understanding of his testimony, your Honor.

The Court: And the part of the record that was read by Mr. Marcus was that he did not remember that he did anything, as I recollect it. I think perhaps the discussion of this had better be in the absence of the jury, and the court will order the jury to retire from the courtroom, and that they bear in mind the admonition of the court and return when called by the bailiff."

Rep. Tr., p. 347, line 20 to p. 349, line 10.

"Mr. Marcus: I object to that as calling for a conclusion.

The Court: Yes, it does. On such an important matter, there should not be any conclusion."

Rep. Tr. p. 500, lines 10-12.

"Just state what you saw him do, or heard him say, if anything; not your conclusion as to what he was doing, Mr. Miller. It is very difficult for a witness to understand it, and you may have some difficulty."

Rep. Tr., p. 500, lines 18-21.

"No, Mr. Combs, that is what he is attempting to explain."

Rep. Tr., p. 514, line 26 to p. 515, line 1.

"He means, have you placed it on the diagram? Was there anything else except that flying act you have referred to, above her rigging, or within the distance between the two center poles?"

Rep. Tr., p. 520, lines 10-13.

"Do the best you can, Mr. Miller."

Rep. Tr., p. 521, line 13.

"He said he did not remember, Mr. Marcus."

Rep. Tr., p. 527, line 2.

"There is no use asking him the question again. He just said he did not remember it."

Rep. Tr., p. 527, lines 4-5.

"It is not necessary to rebut it under such circumstances."

Rep. Tr., p. 575, lines 24-25.

XI.

The District Court erred:

(a) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment non obstante veredicto.

(b) In denying appellants' motions for a new trial.

(c) In admitting answers to questions concerning conversation in an attempted impeachment of Chandler Miller.

On the grounds that the Court allowed extended inquiry of witness Chandler Miller concerning an alleged conversation with appellee in which over objection, appellee's counsel recited a purported and erroneous sum-

mary of said conversation (Rep. Tr., p. 560, line 2 to p. 562, line 23), reiterated same with appellee (Rep. Tr., p. 571, line 20 to p. 575, line 25), which was followed by the comment by the Court: "It is not necessary to rebut it under such circumstances." Through the statements of counsel over objection, and the comments of the Court, the witness was improperly discredited before the jury.

XII.

The District Court erred:

(a) In refusing the motion to strike in the following matter:

"Q. But is it during all of the performances of the other acts before you?

A. No, sir, because some of the other acts needs a place to hang the other rigging. They hang other rigging in the same place, so to tell you when my trapeze exactly goes up, I wouldn't be able. I dont have nothing to do with it.

Q. Who brings your rigging up into position?

Mr. Combs: I move to strike out "I dont have nothing to do with it," as a conclusion of the witness.

The Court: Denied."

Rep. Tr., p. 39, lines 17-26.

(b) In refusing to permit answers to the following questions:

"Q. I presume the second second she fell, however, she did fall at the regular accurate rule of physics?

The Court: Dont answer that. The court will limit the cross examination on that point."

Rep. Tr., p. 146, lines 11-14.

"Q. How long would you say it took your wife to fall from the trapeze bar to the ground?

The Court: I dont think you need answer that question. It is a rule of physics."

[Rep. Tr., p. 146, lines 11-14.

"Q. By Mr. Marcus: If an examination disclosed there was an anesthesia in the right leg of Miss Olvera, would that indicate anything to you, Doctor, from the X-ray?

Mr. Combs: That is objected to as not a complete statement of the facts; assuming facts not in evidence; not a complete statement of the facts in evidence or sufficient upon which to base a hypothetical question.

The Court: It is only to a certain portion of the right leg. The anesthesia did not appear on all the surface.

Q. By Mr. Marcus: In certain parts of the right leg, would that indicate anything from an examination of this X-ray?

Mr. Combs: Same objection; incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Overruled. You may answer.

A. In cases of this nature, where there are areas of anesthesia below the site of the injury it is commonly considered that the injury has involved to some degree some of the roots of the major nerves leaving the spinal column in the site of the injury, and,

therefore, the clinical evidence furnished by the neurologist's examination, coupled with the visual evidence of injury, constitutes a basis for the diagnosis of definite injury involving the nerve trunk—nerve roots, rather.

Mr. Combs: I ask that the answer be stricken upon the ground that no proper foundation has been laid. The question assumes facts not in evidence.

The Court: Motion denied.”

Rep. Tr., p. 216, line 25 to p. 217, line 26.

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

Lee Combs

By Lee Combs

Attorneys for Appellants.

Received copy of the within Statement of Points, etc.,
this 20th day of September, 1944.

David C. Marcus

Attorney for Appellee.

[Endorsed]: Filed Sept. 22, 1944. Paul P. O'Brien,
Clerk.